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Voters Need to Know: Assessing the Legality of Redboxing in Federal Elections

ABSTRACT. This Note presents the first analysis of “redboxing” and its legality. Redboxing is the term used by campaign operatives to describe when candidates and political parties post public, online messages to share campaign strategy with allied super political action committees (PACs). In this Note, I provide the first descriptive account of the practice, and assess its legality under the Federal Election Commission’s (FEC) three-part test for coordination. I contend that the practice violates federal law prohibiting strategic coordination between super PACs, candidates, and parties, as redboxes are illegal requests for super PACs to run an advertisement to help a candidate. I argue that the practice harms democratic accountability and contributes to political polarization by introducing the risk of quid pro quo corruption and allowing candidates to evade the monetary and reputational costs of their own political speech. To begin to root out the practice, I propose litigation strategies that can be implemented in enforcement actions before the FEC, as well as administrative reforms to strengthen coordination rules. Ultimately, I argue that the practice of redboxing reveals just how unsophisticated and misguided the Supreme Court’s campaign-finance jurisprudence really is—and that the FEC’s test for coordination does not draw administrable lines but creates gaping loopholes. Congress must act to force the FEC to adopt a workable, properly calibrated test to deal with redboxing and other coordinative practices that have emerged in the post-*Citizens United* world.

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INTRODUCTION

U.S. Senator Jon Tester's campaign changed fifty-six words on its official website on October 11, 2018.¹ At the time, Tester, the Democratic incumbent from Montana, had been fighting for re-election in a state President Trump won by double digits.² To the average voter scrolling through the Senator's campaign website, a red-hued box emblazoned with the phrase "AN IMPORTANT UPDATE: What Montanans need to know" may have seemed like nothing more than an innocuous graphic design ploy to attract voters' attention on a crowded webpage.³ That day, any voter who clicked on the red box would have found a statement alleging that Matt Rosendale, Tester's Republican challenger, was "no friend of veterans."⁴ It further recounted four votes that Rosendale previously cast against veterans' interests while he served in the state legislature.⁵ The October 11 message also linked to a meticulously curated seven-page document, which provided news clips and roll-call votes to support the allegation of Rosendale's anti-veteran voting record.⁶

Undecided Montana voters who viewed the message behind the red-hued box may have learned of Matt Rosendale's dismal record on veterans issues but likely not much else. After all, average voters would not click the box on Tester's website in search of daily changes. But for those in the know—campaign employees, party-committee staff, and super political action committee (PAC) operatives whose job it was to monitor that page on Tester's campaign web-

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1. Compare Jon Tester for U.S. Senate, *What Montanans Need to Know*, MONTANANS FOR TESTER (Oct. 3, 2018), <https://web.archive.org/web/20181005211418/https://www.jontester.com/critical-update/2017/important-update-montana-race> [https://perma.cc/LV3U-XLJG], with Jon Tester for U.S. Senate, *What Montanans Need to Know*, MONTANANS FOR TESTER (Oct. 11, 2018) [hereinafter Jon Tester for U.S. Senate (Oct. 11, 2018)], <https://web.archive.org/web/20181017164200/https://www.jontester.com/critical-update/2017/important-update-montana-race> [https://perma.cc/DD8X-UNM9] (replacing text on website showing the information that "Montanans Need to Know").
 2. *Montana Presidential Race Results: Donald J. Trump Wins*, N.Y. TIMES (Aug. 1, 2017, 11:26 AM EDT), <https://www.nytimes.com/elections/2016/results/montana-president-clinton-trump> [https://perma.cc/H885-GTAZ].
 3. See JON TESTER FOR U.S. SENATE, <https://web.archive.org/web/20181012183039/https://www.jontester.com> [https://perma.cc/9P7L-SNXS].
 4. Jon Tester for U.S. Senate (Oct. 11, 2018), *supra* note 1.
 5. *See id.*
 6. *Matt Rosendale—Bad for Montana Veterans*, MONTANANS FOR TESTER (Oct. 11, 2018), https://web.archive.org/web/20181018000228/https://www.jontester.com/wp/wp-content/uploads/2018/10/Preview_52EC6EC7-F840-489A-8507-11EECB0186A2.pdf [https://perma.cc/7HMM-MAKU].

site—the October 11 message provided a strategy manual hidden in plain sight. The instructions to super PAC operatives that day: run a veterans-benefits-themed attack ad on challenger Matt Rosendale.

And that is precisely what occurred. On October 16, 2018, five days after the Tester campaign updated its “redbox,” two independent-expenditure-only political committees (known as “super PACs”⁷), VoteVets and Majority Forward, purchased \$850,000 of airtime in support of Jon Tester.⁸ It is illegal for super PACs to coordinate their spending with the candidates they aim to support.⁹ Yet VoteVets and Majority Forward’s ad featured a Vietnam veteran who, straight-to-camera, admonished Matt Rosendale for each of his anti-veteran votes listed in the October 11 redbox.¹⁰ This was not just general message congruence between Tester’s campaign and the super PACs; rather, on October 11, the Tester campaign used its public website to request an attack advertisement about discrete votes that the opponent, Matt Rosendale, took against veterans’ interests. Five days later, two super PACs delivered a six-figure advertisement citing each of the anti-veteran votes the Tester campaign had wrapped in a bow and presented to them.

There are few coincidences when it comes to the millions of dollars spent to win elections. During campaign season, political operatives on both sides of the aisle engage in the signaling tactic employed by the Tester campaign. Among political professionals, this practice is colloquially called “redboxing”—named for the red-colored box that often accompanies these instructions for super PACs placed on public campaign websites.¹¹ Candidates and parties use this signaling system to communicate with super PACs, political committees that can raise and spend unlimited funds in federal elections. Redboxes allow can-

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7. *Registering as a Super PAC*, FED. ELECTION COMM’N, <https://www.fec.gov/help-candidates-and-committees/filing-pac-reports/registering-super-pac> [<https://perma.cc/HV83-A654>] (“Super [political action committees (PACs)] are independent expenditure-only political committees that may receive unlimited contributions from individuals, corporations, labor unions and other political action committees for the purpose of financing independent expenditures [Super PACs cannot] use . . . funds to make contributions, whether direct, in-kind or via coordinated communications, to federal candidates or committees.”).
 8. Press Release, VoteVets, VoteVets, Majority Forward, Team Up for New Ad on Matt Rosendale’s Horrendous Veterans Record, <https://www.votevets.org/press/votevets-majority-forward-team-up-for-new-ad-on-matt-rosendales-horrendous-veterans-record> [<https://perma.cc/P4NH-4EMG>].
 9. 52 U.S.C. § 30116(a)(7)(B)(i)-(ii) (2018).
 10. VoteVets, *Charlie*, YOUTUBE (Oct. 16, 2018), <https://www.youtube.com/watch?v=RmvZFMBul4I> [<https://perma.cc/9H7G-VXZQ>].
 11. See *infra* Section I.A.

didates and parties to circumvent campaign-finance limits and direct the expenditures of allied super PACs. As such, the legality of the practice is dubious.

Congress anticipated the possibility of circumvention and built prohibitory regulation into the statutory scheme. A super PAC's independent *expenditure* transforms into a regulated *contribution* if the super PAC makes the expenditure "in cooperation, consultation, or concert, with, or at the request or suggestion of" a candidate or political party.¹² Candidates, parties, and other political groups that use redboxes to communicate strategy with super PACs deny that the practice amounts to "cooperation," "consultation," or work in "concert" between the groups.¹³ They further deny that a redbox communication is a request or suggestion for an advertisement in violation of the statute. Instead, the candidates and political parties who use redboxes to communicate with super PACs contend that the practice is legal and can be nestled within a safe harbor in coordination law which, in certain cases, exempts publicly available information from being used as evidence of illegal coordination.

In the decade since *Citizens United v. Federal Election Commission*,¹⁴ legal scholars have extensively addressed the impact of independent expenditure groups.¹⁵ There is also no dearth of scholarship on coordination in the campaign-finance literature.¹⁶ And the news media routinely exposes the myriad ways in which real-world campaign practices may run afoul of coordination laws.¹⁷ Only recently, however, has the academy begun to address how cam-

12. 52 U.S.C. § 30116(a)(7)(B)(i)-(ii).

13. *Id.*

14. 558 U.S. 310 (2010).

15. See, e.g., Richard Briffault, *Super PACs*, 96 MINN. L. REV. 1644, 1674-75, 1682 (2012); Heather K. Gerken, *Boden Lecture: The Real Problem with Citizens United: Campaign Finance, Dark Money, and Shadow Parties*, 97 MARQ. L. REV. 903, 915-17 (2014); Michael S. Kang, *The Brave New World of Party Campaign Finance*, 101 CORNELL L. REV. 531, 588-93 (2016) [hereinafter Kang, *Brave New World*]; Michael S. Kang, *The End of Campaign Finance Law*, 98 VA. L. REV. 1, 21-40 (2012) [hereinafter Kang, *The End of Campaign Finance Law*]; Michael S. Kang, *The Year of the Super PAC*, 81 GEO. WASH. L. REV. 1902, 1918 (2013).

16. See, e.g., R. Sam Garrett, *Seriously Funny: Understanding Campaign Finance Policy Through the Colbert Super PAC*, 56 ST. LOUIS U. L.J. 711, 720-21 (2012); Michael D. Gilbert & Brian Barnes, *The Coordination Fallacy*, 43 FLA. ST. U. L. REV. 399, 406-20 (2016); Richard L. Hasen, *Super PAC Contributions, Corruption, and the Proxy War over Coordination*, 9 DUKE J. CONST. L. & PUB. POL'Y 1 (2014); Bradley A. Smith, *Super PACs and the Role of "Coordination" in Campaign Finance Law*, 49 WILLAMETTE L. REV. 603, 607-35 (2013).

17. See, e.g., Matea Gold, *It's Bold, but Legal: How Campaigns and Their Super PAC Backers Work Together*, WASH. POST (July 6, 2015), https://www.washingtonpost.com/politics/here-are-the-secret-ways-super-pacs-and-campaigns-can-work-together/2015/07/06/bda78210-1539-11e5-89f3-61410da94eb1_story.html [https://perma.cc/AJ3A-6ECG].

paigned operations in the age of super PACs can circumvent and undermine the legal foundations integral to campaign-finance law.¹⁸

This Note offers the first systematic account of redboxing and its legality. I contend that the practice violates federal law prohibiting strategic coordination between super PACs, candidates, and parties, as redboxes are illegal requests for an outside group to run an advertisement to help a candidate. Accordingly, nominally independent spending following a redbox request should be treated as an in-kind contribution to a candidate and subject to strict dollar caps. Moreover, the practice of redboxing violates not only the letter of the law but also the spirit of campaign-finance regulation, which aims to limit actual quid pro quo dealings as well as the appearance of potential corruption. In this Note, I demonstrate that eleven years out from *Citizens United*, the distinction between “independence” and “coordination,” upon which modern federal campaign-finance law is built, is a legal fiction. It is a “paper wall” in need of serious rebuilding.¹⁹

This Note proceeds in four Parts. Part I develops chronologically to define the practice of redboxing. It recounts the rise of the practice in response to loosened campaign-finance regulation, illustrates the paradigmatic form of the practice, and demonstrates the ways in which super PACs respond to redboxes with advertisements. Next, Part II explains the statutory scheme that animates the law against coordination, including the safe-harbor provision that defenders of redboxing invoke to assert its legality, and applies the law to the practice of redboxing. In this Part, I argue that redboxes are illegal requests for an advertisement from an outside group. As a result, I contend that expenditures made pursuant to a redbox request should be treated as illegal in-kind contributions under existing law. In Part III, I discuss the harms of redboxing. I argue that redboxes allow nominally independent expenditures to foment the same threat of quid pro quo corruption that direct contributions to candidates do. Redboxes empower political parties, contributing to increased levels of ideological polarization, and they harm traditional democratic-accountability

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18. See, e.g., DANIEL P. TOKAJI & RENATA E. B. STRAUSE, *THE NEW SOFT MONEY: OUTSIDE SPENDING IN CONGRESSIONAL ELECTIONS* 64-69 (2014); Richard Briffault, *Coordination Reconsidered*, 113 COLUM. L. REV. SIDEBAR 88, 92-100 (2013); Marc E. Klepner, *When “Testing the Waters” Tests the Limits of Coordination Restrictions: Revising FEC Regulations to Limit Pre-Candidacy Coordination*, 84 FORDHAM L. REV. 1691, 1695-1706 (2016); Note, *Working Together for an Independent Expenditure: Candidate Assistance with Super PAC Fundraising*, 128 HARV. L. REV. 1478, 1487-94 (2015).
19. Philip Bump, *Republicans, Twitter and the Brave New World of Campaign/Outside Group Coordination*, WASH. POST (Nov. 17, 2014, 9:25 AM EST), <https://www.washingtonpost.com/news/the-fix/wp/2014/11/17/republicans-twitter-and-the-brave-new-world-of-campaign-outside-group-coordination> [<https://perma.cc/CM6R-58H5>].

mechanisms by allowing candidates to systematically evade the monetary and reputational costs of their political speech. Finally, Part IV addresses the opportunities and challenges for enforcement under existing law, suggests changes to Federal Election Commission (FEC) regulations, and implores the new Congress to pursue lasting reform.

I. REDBOXING FROM 2010 TO TODAY

“Redbox” is the term political operatives use to describe a public, online message posted by a candidate or political party to share campaign strategy with allied super PACs. The redbox is “the campaign’s guidance on what it thinks it needs” or “what it wants” from outside groups to help the candidate win her race.²⁰ At the most basic level, there are two parts to a redbox: first, a message about the candidate or her opponent, and second, a signal which differentiates that message from other text on the webpage. Redboxes are the political equivalent of the spy’s “dead letter box,” employed by intelligence agents to surreptitiously communicate with their informants.²¹ They allow political operatives who work for candidates and parties to transmit instructions for advertising, polling and targeting data, and other useful materials to super PACs with the intent to direct the expenditures of these nominally independent groups. The public, indirect nature of the communication strategy, honed over the last decade, allows operatives to plausibly—though disingenuously—deny that they communicate with outside groups to coordinate strategy. This Part presents a chronological account of redboxing to show how the practice originated and how redboxing works from the initial posting on a campaign website to the final advertisement by an outside group. Section I.A describes how and why the practice emerged in response to loosened campaign-finance laws post-*Citizens United*. Next, Section I.B illustrates the paradigmatic signaling tactics inherent to the practice. I call these the “magic signals” of redboxing: they

20. Telephone Interview with a Political Consultant Who Has Worked for Candidates, Party Committees, and Super PACs (Mar. 13, 2020) [hereinafter Telephone Interview with a Political Consultant] (name of interviewee withheld by mutual agreement).

21. Linda Wertheimer, *The Top-Secret History of the Dead Letter Box*, NPR (July 12, 2008, 8:00 AM ET), <https://www.npr.org/templates/story/story.php?storyId=92489127> [<https://perma.cc/8LRY-YW4N>]. At the height of the Cold War, international spies and their handlers used dead-letter boxes to transmit information. They would use envelopes made from inconspicuous objects, like cigarette packets, hidden in public places, like on park benches, to communicate without being caught. Before placing information at the “dead drops,” the agents and handlers agreed upon the location and the vessel for the communication. The indirect hand-off protected both parties from being caught communicating with one another. *See id.*

transform merely informative text on a public website into carefully curated instructions for how super PACs can aid candidates. Finally, Section I.C demonstrates how independent spenders have become conditioned to respond to these signals by producing voter-facing communications that often copy redbox instructions verbatim.

A. *The Emergence of Redboxing*

Redboxing originated shortly after the Court's decision in *Citizens United v. Federal Election Commission*.²² Although the impact of *Citizens United* remains hotly debated across legal circles and in popular discourse, two aftereffects of the decision are undeniable. First, the number of independent-expenditure-only groups – super PACs – registered with the FEC grew exponentially.²³ Second, independent-expenditure-only groups have drastically increased their spending each cycle, both in terms of actual dollars and as a share of total spending in federal elections.²⁴ Following *Citizens United*, the D.C. Circuit

22. 558 U.S. 310 (2010).

23. In 2010, only eighty-three independent-expenditure-only groups registered with the Federal Election Commission (FEC). See Ctr. for Responsive Politics, *2010 Outside Spending, by Super PAC*, OPEN SECRETS, <https://www.opensecrets.org/outsidespending/summ.php?cycle=2010&chrt=V&disp=O&type=S> [<https://perma.cc/G4M7-F45A>] [hereinafter Ctr. for Responsive Politics, *2010 Outside Spending*]. By 2012, that number grew to 1,275. See Ctr. for Responsive Politics, *2012 Outside Spending, by Super PAC*, OPEN SECRETS, <https://www.opensecrets.org/outsidespending/summ.php?cycle=2012&chrt=V&disp=O&type=S> [<https://perma.cc/4VF3-W5CK>]. At the end of the 2018 cycle, over 2,395 super PACs were registered. See Ctr. for Responsive Politics, *2018 Outside Spending, by Super PAC*, OPEN SECRETS, <https://www.opensecrets.org/outsidespending/summ.php?cycle=2018&chrt=V&disp=O&type=S> [<https://perma.cc/PD69-2ZK3>] [hereinafter Ctr. for Responsive Politics, *2018 Outside Spending*]; see also Matt Bai, *How Much Has Citizens United Changed the Political Game?*, N.Y. TIMES MAG. (July 17, 2012), <https://www.nytimes.com/2012/07/22/magazine/how-much-has-citizens-united-changed-the-political-game.html> [<https://perma.cc/C7HB-BJ9Z>] (describing changes to campaign spending after *Citizens United*).

24. In the last decade, the amount of independent spending has increased more than tenfold in midterm elections and has nearly doubled in presidential years. In the 2010 cycle, independent expenditure groups spent an estimated \$62 million in federal elections. Ctr. for Responsive Politics, *2010 Outside Spending*, *supra* note 23. By 2018, the most recent midterm cycle, independent groups spent over \$800 million. Ctr. for Responsive Politics, *2018 Outside Spending*, *supra* note 23. The presidential years follow a similar, but less striking, pattern. In 2012, super PACs spent \$609 million on the race. Ctr. for Responsive Politics, *2012 Outside Spending, by Super PAC*, OPEN SECRETS, <https://www.opensecrets.org/outsidespending/summ.php?cycle=2012&chrt=V&type=S> [<https://perma.cc/7KYX-H2PB>]. By 2016, super PACs spent over \$1 billion. See Ctr. for Responsive Politics, *2016 Outside Spending, by Super PAC*, OPEN SECRETS, <https://www.opensecrets.org/outsidespending/summ.php?cycle=2016&chrt=V&disp=O&type=S> [<https://perma.cc/AB6G-PPMY>]. This figure dou-

struck down limits on individual contributions to super PACs.²⁵ Consequently, independent-expenditure-only groups constitute the least regulated path to spending in federal elections, leading candidates and party committees to embrace them.²⁶

Many candidates have set up their own super PACs, which are often staffed (and sometimes bankrolled) by close friends, family members, or former campaign employees.²⁷ Donors to the Democratic and Republican national party committees have also established super PACs staffed by the former employees of the party committees (party-adjacent, or shadow-party super PACs).²⁸

bled in the 2020 cycle: super PACs spent over \$2 billion. Ctr. for Responsive Politics, *2020 Outside Spending, by Super PAC*, OPEN SECRETS, <https://www.opensecrets.org/outsidespending/summ.php?chrt=V&type=S> [<https://perma.cc/5LFG-W8N2>]; see also Douglas M. Spencer & Abby K. Wood, *Citizens United, States Divided: An Empirical Analysis of Independent Political Spending*, 89 IND. L.J. 315, 347 (2014). Professors Spencer and Wood studied the states as a natural experiment to understand changes in political spending post-*Citizens United*. They observed “one significant change in the treated states [the states with a corporate or union political-spending ban before the *Citizens United* decision]: spending by outside groups—both 501(c) nonprofit organizations and 527 political committees—nearly doubled both in terms of actual dollars (\$25 million increase) and as a share of all spending (77% increase).” *Id.* at 347.

25. *SpeechNow.org v. Fed. Election Comm’n*, 599 F.3d 686, 698 (D.C. Cir. 2010) (striking down as unconstitutional after *Citizens United* a provision in the Federal Election Campaign Act restricting individual contributions to independent-expenditure-only political committees).
26. Election-law scholar Michael S. Kang argues that the growth of the super-PAC vehicle after *Citizens United* is a natural consequence of the hydraulics of campaign finance. Kang, *The End of Campaign Finance Law*, *supra* note 15, at 39. Kang builds off Pamela Karlan and Samuel Issacharoff’s seminal hypothesis on the hydraulics of campaign finance: political money will always flow to the least regulated entities. See Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705 (1999). In so doing, Kang argues that the doctrinal implication of *Citizens United* is that there are virtually no government interests that can uphold restrictions on independent expenditures. See Kang, *The End of Campaign Finance Law*, *supra* note 15, at 39.
27. See, e.g., Briffault, *supra* note 15, at 1644 (describing former Utah Governor Huntsman’s super PAC, Our Destiny, which received the majority of its funding from Governor Huntsman’s father and was established by an executive of the Huntsman Corporation, the Governor’s family business); see also Briffault, *supra* note 18, at 90 (describing how some super PACs “not only devote[] all their spending to a single candidate, but they also frequently enjoy[] close structural relationships with the candidates they back[]. The single-candidate Super PACs [are] frequently organized and directed by former staffers of that candidate”).
28. See, e.g., Tom Hamburger & Matea Gold, *Some Democrats Favor a Shift to More Outside Campaign Spending*, L.A. TIMES (Nov. 4, 2010, 12:00 AM), <https://www.latimes.com/archives/la-xpm-2010-nov-04-la-na-money-politics-20101104-story.html> [<https://perma.cc/UHJ7-YM3B>] (describing efforts by partisan donors to form party-adjacent super PACs). These party-adjacent super PACs are often staffed by former party committee operatives. For ex-

Though super PACs have the freedom to raise and spend unlimited funds, the groups are not allowed to coordinate their spending decisions with candidates or political parties.²⁹ There are serious drawbacks to a system in which independent groups are the principal supplements to candidates and parties while theoretically outside of their control. Candidates and parties would prefer direct control over their own messaging, and super PACs “do not always respond quickly and appropriately to changing dynamics of a campaign” no matter how closely affiliated they are with a candidate or party, or how sophisticated the political professionals running the committees are.³⁰ As political scientist Raymond La Raja observes, “independent campaigns are a second-best strategy for candidates.”³¹ Understandably, with the stakes as high as control of the federal government, political operatives formed an underground system to facilitate communication between candidates, parties, and independent groups.

The idea that candidates and parties could communicate their strategic desires to super PACs using public websites arose in party committees shortly after the *Citizens United* decision.³² Following the decision, national party committee staffers batted around ideas for how their candidates could capitalize on the growing number of super PACs and communicate the candidates’ strategic plans and desires to these independent-expenditure-only groups.³³ In one of the first iterations of the practice, the party committees advised candidates to post the “top hits” against their opponents on their public websites in the hopes that super PACs would see these messages and act upon them.³⁴ However, that strategy proved to be far too subtle to generate meaningful super PAC spending because it lacked a mechanism to differentiate the messages

ample, Mike Duncan, chair of the Senate Leadership Fund (SLF) super PAC, served as the sixtieth chairman of the Republican National Committee. In addition, SLF’s political director is Carl Forti, the former director of the National Republican Congressional Committee’s independent expenditure program for the 2002, 2004, and 2006 cycles. And Mark McLaughlin, SLF’s research director, served as research director of the National Republican Senatorial Committee during the 2014 and 2016 cycles. *Leadership Team*, SENATE LEADERSHIP FUND, <https://web.archive.org/web/20200423024303/https://www.senateleadershipfund.org/leadership-team> [https://perma.cc/YZ7T-ZZBS].

29. See *infra* Section II.A.
30. Raymond J. La Raja, *Why Super PACs: How the American Party System Outgrew the Campaign Finance System*, 10 FORUM 91, 101 (2012).
31. *Id.*
32. Telephone Interview with a Political Attorney Who Formerly Advised a Major Political Party Committee (Mar. 6, 2020) [hereinafter Telephone Interview with a Political Attorney] (name of interviewee withheld by mutual agreement).
33. *Id.*; Telephone Interview with a Political Consultant, *supra* note 20.
34. Telephone Interview with a Political Attorney, *supra* note 32.

for voter consumption from those intended for super PAC use. In debrief meetings after the election cycle, candidate staffers, super PAC employees, and party committee operatives gathered together to share ways to improve the practice.³⁵ They ultimately settled on the use of red-colored boxes on public political websites as a tip-off to super PACs: the message within the box would indicate what information the candidate wanted the super PAC to use in an advertisement. The revolving door between candidate and party staff, political consultants, and super PAC employees facilitated the spread of the practice, and redboxing became an open secret within the industry.³⁶ Independent-expenditure-committee staff likewise became “conditioned to check the website’ of the campaigns they [were] trying to help,” thus routinizing a system of communication between super PAC staff and the campaigns.³⁷

The practice has mutated iteratively over the last decade. As insiders have refined the practice at the conclusion of each election cycle, its signaling mechanisms have evolved to become more nuanced and well-defined, and thus more effective.³⁸ While many candidates still use a red-colored box to tip-off super PACs to the message they want used in an advertisement, the practice has developed to include a host of “magic signals” that indicate the presence of a message to super PACs. In the next Section, I describe the paradigmatic “magic signals” of redboxing to demonstrate what exactly super PACs look for when they search for guidance from candidates on public webpages.

B. The “Magic Signals” of Redboxing

Since its inception nearly a decade ago, the practice of redboxing has entailed posting both a message concerning a candidate or her opponent *and* a

35. Telephone Interview with a Political Consultant, *supra* note 20.

36. As Daniel P. Tokaji and Renata E. B. Strause learned through their interviews with political operatives, the “clarity of signals may build over multiple election cycles as professional operatives move between jobs.” TOKAJI & STRAUSE, *supra* note 18, at 67. Drawing from their study of political-consultant networks, political scientists Brendan Nyhan and Jacob M. Montgomery add that consultants help to spread similar campaign strategies among the candidates and political committees for which they work. Brendan Nyhan & Jacob M. Montgomery, *Connecting the Candidates: Consultant Networks and the Diffusion of Campaign Strategy in American Congressional Elections*, 59 AM. J. POL. SCI. 292, 302 (2015).

37. TOKAJI & STRAUSE, *supra* note 18, at 66.

38. For example, in response to complaints that checking multiple candidate webpages daily made monitoring costs too high, candidates added the date and timestamps to their redboxes to show when the message was last updated. Telephone Interview with a Political Consultant, *supra* note 20. Party organizations also assumed responsibility for aggregating their candidates’ redboxes on a centralized website for ease of access. See *infra* Section I.B.3.

visual cue which acts as a tip-off to super PACs that the message is intended for use in an advertisement. I call the latter element “magic signals” because they act much like the “magic words” of express advocacy once did.³⁹ Just as the inclusion of certain words that advocate the election or defeat of a candidate could transform an electioneering communication into a piece of express advocacy and subject it to regulation,⁴⁰ to attach certain “magic signals” to a specific message on a public campaign website can constitute an attempt to request an advertisement from a super PAC.⁴¹ Although reporters, scholars, and concerned citizens have made recent attempts to pinpoint the online signaling mechanisms employed by campaigns, they often identify them incompletely or fail to document the full scope of the practice.⁴² Importantly, because the signaling mechanisms of the practice have evolved iteratively and because political elites seek to retain plausible deniability that a systematic coordination scheme has evolved—the signals are largely fluid and will likely continue to change without explicit regulation.⁴³ That is not to say that the practice does not have a paradigmatic form. In this Section, I demonstrate the archetypal signals of the practice. Not every redbox employs all of the signaling mechanisms enumerated below. However, most have at least two signals that make these redboxes easily identifiable to super PACs. The more “magic signals” attached

39. Prior to *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003), the inclusion of certain “magic words” advocating the election or defeat of a candidate for federal office could transform an electioneering communication into a piece of express advocacy and subject it to regulation. See *Buckley v. Valeo*, 424 U.S. 1, 44 n.52 (1976).

40. *Buckley*, 424 U.S. at 44 n.52.

41. See discussion *infra* Section II.C.

42. See, e.g., TOKAJI & STRAUSE, *supra* note 18, at 66; Gold, *supra* note 17; Michael Goldberg, *Accusations of “Red-Boxing” in 10th Congressional District, Explained*, WASH. ST. WIRE (July 3, 2020), <https://washingtonstatewire.com/accusations-of-red-boxing-enter-10th-district-congressional-race> [https://perma.cc/AQ6P-J6PD]; Alex Roarty, Shane Goldmacher & National Journal, *They’re Not Allowed to Talk. But Candidates and PACs Are Brazenly Communicating All the Time*, ATLANTIC (Oct. 30, 2014), <https://www.theatlantic.com/politics/archive/2014/10/theyre-not-allowed-to-talk-but-candidates-and-pacs-are-brazenly-communicating-all-the-time/435771> [https://perma.cc/AFQ5-YQ96]; Sean Sullivan, *Super PACs and Campaigns Can’t Talk to Each Other. Here’s How They Get Around It*, WASH. POST (Apr. 24, 2014), <https://www.washingtonpost.com/news/the-fix/wp/2014/04/24/super-pacs-and-campaigns-cant-talk-to-each-other-heres-how-they-get-around-it> [https://perma.cc/28WN-YE7E]; DocDawg, *Red-Boxing: How Candidates Evade Campaign Finance Law Without *Quite* Breaking It*, DAILY KOS (Jan. 23, 2020, 3:17 PM EST) [hereinafter *How Campaigns Evade*], <https://www.dailykos.com/stories/2020/1/23/1913533/-Red-Boxing-how-candidates-evade-campaign-finance-law-without-quite-breaking-it> [https://perma.cc/TW59-QAXV].

43. See discussion *infra* Sections IV.B, IV.C.

to a message, the more certain one can be that a particular message is designed to be a strategic instruction to allied super PACs.

1. *The Colored Box*

The first and most prototypical indicator of the existence of a redbox is a colored box outlining the instruction to a super PAC. When the practice first emerged, candidates and party insiders would place a red-shaded or red-outlined box on a website to communicate with super PACs.⁴⁴ The red-colored box itself was a tip-off to super PACs that the information inside the box was intended for them. However, the box need not be literally red, and often these boxes can be blue or other colors so long as they clearly demarcate the desired message to be spread.⁴⁵

FIGURE 1.

EXAMPLE OF REDBOX FROM MARK KELLY FOR U.S. SENATE⁴⁶



44. See, e.g., DocDawg, *supra* note 42.

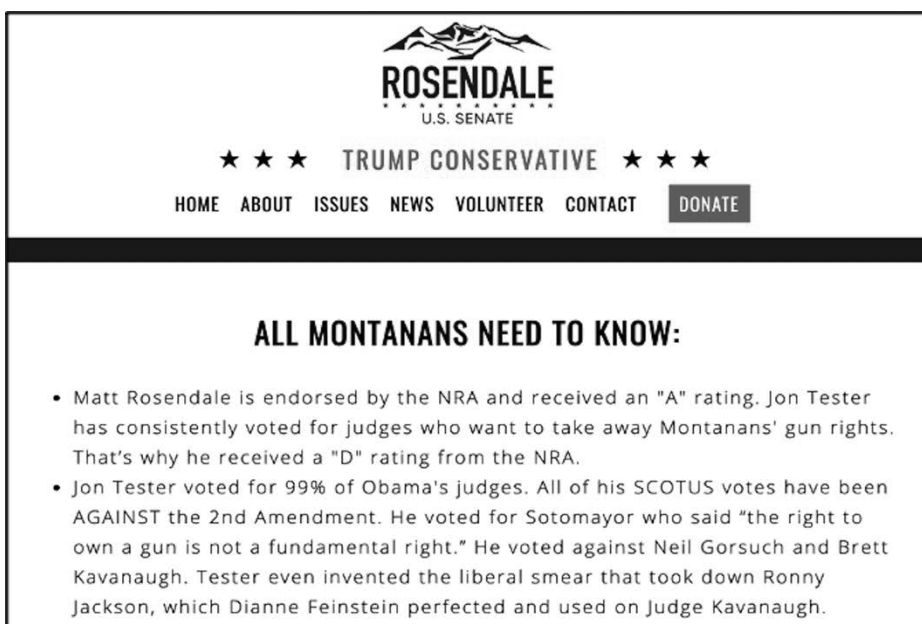
45. See, e.g., MARK KELLY FOR U.S. SENATE, <https://web.archive.org/web/20201111002132/https://markkelly.com> [<https://perma.cc/P43C-6J7G>].

46. *Id.*

2. *The Phrase “Voters Need to Know”*

An additional signal that indicates the presence of a redbox is the phrase “Voters Need to Know” or similar state-specific language. For instance, Republican Senate candidate Matt Rosendale communicated the existence of a redbox on his campaign website using the phrase “ALL MONTANANS NEED TO KNOW.”⁴⁷

FIGURE 2.
EXAMPLE OF REDBOX FROM MATT ROSENDALE FOR U.S. SENATE⁴⁸



3. *Party Committee Microsites*

Another way super PACs can find the campaign’s guidance, separate from searching candidate websites for a colored box or the phrase “voters need to

47. *More About Matt*, MATT FOR MONT., <https://web.archive.org/web/20181023222345/http://www.mattformontana.com/more-about-matt> [<https://perma.cc/9KGU-VUQS>].

48. *Id.*

know,” is to search for political microsites created by the parties to disseminate redboxes. Political microsites are websites designed to perform a specific, political task.⁴⁹ In this case, parties indicate the presence of redboxes by placing them on websites that only those who know where to look would find them. The aggregation of these messages on certain websites evinces the coordinated nature of the redboxing practice, and these party-controlled microsites serve two purposes. First, they reduce monitoring costs for super PACs. Indeed, according to one political consultant interviewed, parties developed these microsites in response to super PAC complaints that monitoring multiple candidate websites daily was too time-consuming.⁵⁰ Second, party microsites allow the *parties*—rather than specific *candidates*—to instruct super PACs on spending decisions. Unlike candidates who are primarily concerned with their individual war chests, parties have broader interests and the foresight to direct resources to maximize the party’s overall success.

Both major political parties operate redbox microsites, though Republicans operate House *and* Senate microsites while Democrats only operate a House microsite. On the Republican side, the national party committees for the House and Senate operate two microsites.⁵¹ When one clicks on a state on the website’s interactive map where there is a contentious election, she views “Key Takeaways” that provide super PACs with instructions on how best to spend their funds.⁵² The Democratic party similarly aggregates its redboxes for House candidates on a page affiliated with its official webpage. The microsite, DCCC Races, also features a large map of the country on it.⁵³ When one clicks on a specific state and congressional district, the party’s redbox appears.⁵⁴

49. Colin Delany, *Microsites on the March*, CAMPAIGNS & ELECTIONS (Feb. 15, 2012), <https://www.campaignsandelections.com/campaign-insider/microsites-on-the-march> [<https://perma.cc/KT6U-U88M>].

50. Telephone Interview with a Political Consultant, *supra* note 20.

51. The Republican’s House committee, the National Republican Congressional Committee (NRCC), operates a microsite separate from their official website. *See* DEMOCRAT FACTS, <https://www.democratfacts.org> [<https://perma.cc/MVR7-RQ57>]. By contrast, the National Republican Senatorial Committee (NRSC) hosts their redbox microsite on a webpage affiliated with their official website. *See* 2020 Senate Race, NRSC, <https://www.nrsc.org/senate-map> [<https://perma.cc/A5K8-ZUH8>]. The NRSC’s redboxes for their Republican Senate candidates are organized in a large map on the microsite. *Id.*

52. *See, e.g., Georgia*, NAT’L REPUBLICAN SENATORIAL COMM., https://www.nrsc.org/state_election/ga [<https://perma.cc/44Q7-SWZN>].

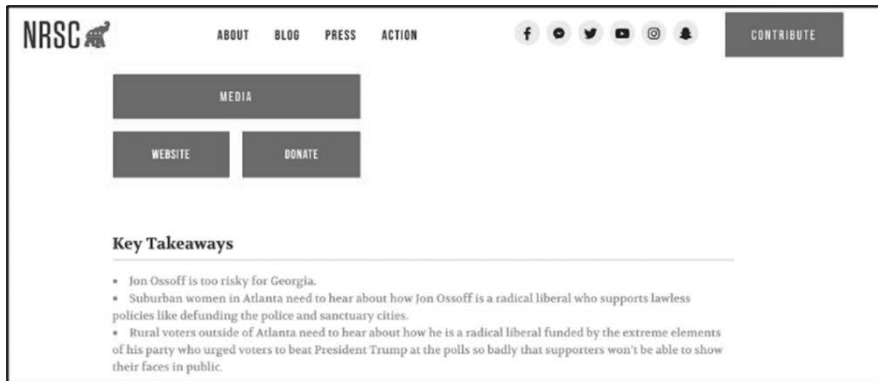
53. DCCC, RACES, <https://dcc.org/races> [<https://perma.cc/2UY7-S42Q>].

54. *See, e.g., California’s 25th (CA-25)*, DCCC (Sept. 24, 2020), <https://dcc.org/races/ca-25> [<https://perma.cc/PTN6-ZZBY>].

FIGURE 3A.
EXAMPLE OF NRSC REDBOX⁵⁵



FIGURE 3B.
EXAMPLE OF NRSC REDBOX⁵⁶



55. *2020 Senate Race*, *supra* note 51.

56. *Georgia*, NAT'L REPUBLICAN SENATORIAL COMM., *supra* note 52.

4. Targeting Information

A redbox also often includes targeting information that signals a certain message's purpose to instruct super PACs rather than to educate voters. Targeting information indicates a desired advertisement's intended audience, timing, frequency, means, or mode of communication. Take, for example, the targeting information included in the Democratic Congressional Campaign Committee's (DCCC) redbox on behalf of Democrat Christy Smith in CA-25. It asserted that "[v]oters across the district . . . need to see" that Smith's Republican opponent Mike Garcia supports a tax plan that gives "millionaires like himself a huge tax giveaway."⁵⁷ It also stressed that "[m]en—especially Democrats, Independents under 50, and Latinos—need to read and see on the go" that "Garcia is already breaking his promise to be a moderate."⁵⁸ The details in this messaging are no coincidence. They convey the desired mode and method of communication. The content voters need to "see" suggests television advertisements, "read" points to direct mail, and "see on the go" likely refers to digital advertisements.⁵⁹ This type of targeting information is useless to an average voter, who has little reason to know or care which demographic groups see which message. However, it is extremely useful to super PACs when they choose channels for television advertisements or which groups of voters to send direct mailers to or target with online advertisements.

5. Back-Up Documents and Production Elements

Finally, some public political websites indicate the presence of redboxes with PDF attachments which "back-up" the claims made on the website or B-roll video that could be used in subsequent advertisements.⁶⁰ The presence of back-up documents and B-roll video appended to a certain message on a campaign website serves as a signal to super PACs that a candidate intends to explicitly direct a super PAC's advertising strategy. Although back-up and production elements may seem ancillary, they are extremely important: fabricated

57. *California's 25th (CA-25)*, *supra* note 54.

58. *Id.*

59. *Id.*

60. See, e.g., *What's with This Video of Mitch McConnell Doing Stuff?*, NPR (Mar. 24, 2014, 6:51 PM ET), <https://www.npr.org/sections/itsallpolitics/2014/03/29/295927924/whats-with-this-video-of-mcconnell-doing-stuff> [<https://perma.cc/UVT6-6LZ5>].

claims in an advertisement can subject the sponsor of the ad, and the television stations that run it, to legal action by political opponents.⁶¹

In addition, the provision of production elements such as video footage, pictures, or audio allows super PACs to quickly execute requests for communication without going through the time-consuming and expensive process of filming their own material. A recent example illustrates how campaigns provide these resources to super PACs as part of their redboxing efforts. On September 19, 2020, the National Republican Congressional Committee (NRCC) posted a message on its microsite alleging that Democratic Congresswoman Debbie Mucarsel-Powell's "husband was paid seven hundred thousand dollars by a company linked to Ihor Kolomoisky, a Ukrainian oligarch who has been accused of billion-dollar criminal schemes and contract killings."⁶² The "Narrative" tab on the microsite then additionally provides back-up and production elements to accompany this message: (1) three news stories under links titled "Oligarch Story"; (2) a graphic detailing the purported connections between Mucarsel-Powell's husband and the Ukrainian oligarch; and (3) a photograph of Mucarsel-Powell superimposed beside the Ukrainian oligarch that makes it look like the two are standing side-by-side.⁶³ The "FL-26 Media" tab on the microsite links to a folder containing B-roll video of Mucarsel-Powell, as well as a document describing each video clip and time stamps of useful shots.⁶⁴ Just five days after the NRCC posted its redbox and accompanying resources, Congressional Leadership Fund (CLF), a super PAC allied closely with the Republican Party, aired an ad entitled "Warlord" that detailed Mucarsel-Powell's family's relationship to the Ukrainian oligarch.⁶⁵ CLF's ad not only incorporated images of the newspaper stories linked in the NRCC's redbox, but it used B-roll footage from the NRCC's carefully curated folder of video clips.⁶⁶

* * *

61. See, e.g., Jonathan Easley, *Trump Campaign Sues TV Station over Democratic Super PAC Ad*, HILL (Apr. 13, 2020, 11:19 AM EDT), <https://thehill.com/homenews/campaign/492499-trump-campaign-sues-tv-station-over-democratic-super-pac-ad> [<https://perma.cc/WH6R-3JLK>].

62. *Debbie Powell FL-26*, DEMOCRATFACTS (Sept. 19, 2020), <https://www.democratfacts.org/candidates/debbie-mucarsel-powell> [<https://perma.cc/SPQ3-Z9E9>].

63. *Id.*

64. See Memorandum, Am. Rising Corp., Best of B-Roll: Debbie Mucarsel-Powell (on file with author); Video Materials: Debbie Mucarsel-Powell (on file with author).

65. CLFSuperPAC, *Debbie Mucarsel-Powell, Warlord (FL-26)*, YOUTUBE (Sept. 23, 2020), <https://www.youtube.com/watch?v=z82kKhxwQ34> [<https://perma.cc/72CH-XJ6J>].

66. See *id.*

The aforementioned features demonstrate that redboxes in fact follow regularized patterns, evidencing the careful and intentional ways in which campaigns deploy them to communicate with super PACs. In the next Section, I turn to describing how super PACs respond to these redboxing signals and how they develop advertisements accordingly.

C. Super PAC Responses to Redboxes

The Introduction presented an example of redboxing in Jon Tester's 2018 campaign for U.S. Senate. Tester used redboxing to prompt the super PACs VoteVets and Majority Forward to air an advertisement against his opponent, Matt Rosendale. This Section provides two additional examples to demonstrate how super PACs pick up on redboxes and respond with advertisements. When candidates and parties speak through redbox messages on their websites, super PACs do more than listen. They act.

The campaign of Jon Tester's Republican challenger, Matt Rosendale, used its own version of redboxing to request that GOP-friendly super PACs strike back at Tester. In early July 2018, Rosendale admitted, in a leaked audio recording, that he had spoken with Chris Cox, "the NRA's [National Rifle Association] top political strategist for its Institute of Legislative Action."⁶⁷ On tape, Rosendale admitted that Cox told him "[w]e're going to be in this race."⁶⁸ The NRA eventually entered the race with a \$404,496 ad buy against Tester on September 6.⁶⁹

A watchdog group filed a complaint with the FEC alleging a violation of coordination rules over Rosendale's furtive conversations with the NRA.⁷⁰ They claimed these secret conversations were smoking-gun evidence of illegal coordination.⁷¹ But to get the full picture of how the NRA and Rosendale's campaign purportedly coordinated, it is important not only to examine Rosendale's private statements, but also his campaign's public ones—including any

67. John Adams, *Daily Beast Audio Reveals Potential Illegal Coordination Between NRA and Matt Rosendale*, MONT. PUB. RADIO (Sept. 13, 2018), <https://www.mtpr.org/post/daily-beast-audio-reveals-potential-illegal-coordination-between-nra-and-matt-rosendale> [https://perma.cc/JLF3-7WY6].

68. *Id.*

69. *Id.*

70. FEC MUR 6888 (Republican National Committee, et al.), Complaint (Sept. 14, 2018), <https://campaignlegal.org/sites/default/files/2018-09/CLC%20Complaint%20to%20FEC%20Against%20Rosendale%20%2B%20NRA.pdf> [https://perma.cc/6FXG-WQJR].

71. *Id.*

redboxes on his public campaign website. On October 17, Rosendale updated the redbox on his campaign's website to include two previously unlisted bullet points attacking Jon Tester for his "D" rating from the NRA and his votes for anti-Second Amendment judges.⁷² That same day, the NRA ordered a \$93,000 flight of radio ads to attack Rosendale's opponent.⁷³ Montanans heard the NRA's ad on the radio two days later.⁷⁴

Super PACs not only monitor candidate websites to get directions from candidates about *when* to go on air, but also to receive instructions regarding the content of their advertisements. They may even brazenly use the redbox message as a script for their ad, as the Republican Party alleged the super PAC Senate Majority PAC (SMP) did in response to a redbox posted by Democratic Senator Jeanne Shaheen's campaign.⁷⁵ On April 23, 2014, the Shaheen campaign updated its redbox to assert that when Shaheen's opponent Scott "Brown was the Senator from Massachusetts[,] he gave big oil billions in special breaks."⁷⁶ The redbox included a seven-page back-up document citing Brown's roll call votes to supply tax breaks to oil companies.⁷⁷ The same day, the Democratic Senatorial Campaign Committee's National Press Secretary tweeted, "Important Message for NH: Koch Brothers are trying to buy Scott Brown a Senate seat," linking to the redbox on Shaheen's campaign website.⁷⁸ Super PACs took the bait. Three days later, the super PAC Senate Majority PAC came out with an advertisement on Scott Brown's "big oil baggage" taking the Sha-

72. *More About Matt*, *supra* note 47.

73. The NRA-PVF paid Starboard Strategic, Inc. \$93,746 for an independent expenditure opposing Jon Tester (Rosendale's opponent) in the Montana U.S. Senate race, described as "Media Buy – Radio." Nat'l Rifle Ass'n of Amer. Political Victory Fund, *Schedule E (FEC Form 3X)*, FED. ELECTION COMM'N 1160 (Oct. 25, 2018), <http://docquery.fec.gov/cgi-bin/fecimg/?201810259131064945> [<https://perma.cc/L5GB-JL3G>].

74. *Agreement Form for Non-Candidate/Issue Advertisements*, RED EAGLE MEDIA GRP. 7 (Oct. 19, 2018), <https://www.opensecrets.org/ad-data/document?id=1674945452> [<https://perma.cc/7YS3-G4P3>].

75. FEC MUR 6821 (Shaheen for Senate, et al.), Complaint, at 2 (Apr. 29, 2014), <https://www.fec.gov/files/legal/murs/6821/15044382876.pdf> [<https://perma.cc/U2TF-6RBE>].

76. *An Important Message for New Hampshire*, JEANNE SHAHEEN FOR U.S. SENATE (Apr. 23, 2014), https://web.archive.org/web/20140425002606if_/http://jeannshaheen.org/message [<https://perma.cc/W47E-FWXS>].

77. *Brown's Big Oil & Wall Street Benefactors Trying to Buy Him a Senate Seat to Again Protect Their Interests*, JEANNE SHAHEEN FOR U.S. SENATE (Apr. 23, 2014), <https://web.archive.org/web/20140425004322/http://jeannshaheen.org/wp-content/uploads/2014/04/Brown%E2%80%99s-Big-Oil-Wall-Street-Benefactors-Trying-To-Buy-Him-A-Senate-Seat-To-Again-Protect-Their-Interests-.pdf> [<https://perma.cc/RF24-C3CD>].

78. @JustinBarasky, TWITTER (Apr. 23, 2014, 4:27 PM), <https://twitter.com/JustinBarasky/status/459081245449023490> [<https://perma.cc/HJN2-CJLR>].

been campaign's redbox message point-by-point and incorporating it into the script of this ad.⁷⁹

* * *

This Part has outlined the history of redboxing and detailed the prototypical form of the practice. It has also provided examples to demonstrate how the practice works from the time a candidate or political party posts a redbox to the ultimate advertisement created by a nominally independent group. The next Part explains the law of coordination and asserts that the practice of redboxing is illegal under the law as it stands.

II. REDBOXING AND THE LAW AGAINST COORDINATION

Federal law dictates that “expenditures made by any person in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committee” or a “committee of a political party . . . shall be considered to be contributions made to such party committee” or candidate.⁸⁰ The law against coordination and its related rules stem from the doctrine set forth in *Buckley v. Valeo*.⁸¹ In *Buckley*, the Court held that the government could regulate contributions to candidates and political parties but not independent expenditures,⁸² largely because contributions can encourage corruption and quid pro quos while independent expenditures cannot.⁸³ Critical to the Court's decision was the distinction between independence and coordination. As long as independent expenditures are “made totally independently of the candidate,” the “absence of prearrangement and coordination . . . alleviates the danger” of corruption.⁸⁴

Under *Buckley*, when a nominally independent group coordinates its expenditures with a candidate or political party committee, the expenditure is

79. See Complaint, *supra* note 75, at 2.

80. 52 U.S.C. § 30116(a)(7)(B)(i)-(ii) (2018).

81. 424 U.S. 1 (1976).

82. *Id.* at 19-21.

83. The notion that independent expenditures cannot engender the threat of quid pro quo corruption was underscored by the Court in *Citizens United* when Justice Kennedy, writing for the majority, proclaimed that the “Court now concludes that independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption.” *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 357 (2010).

84. *Buckley*, 424 U.S. at 47.

treated as a contribution subject to dollar limitations and disclosure requirements. Many independent communications would cease to exist were they subject to contribution limits because most worthwhile media expenditures are more expensive than the contribution-limit ceiling.⁸⁵ In addition, super PACs are not allowed to make *any* contributions directly to candidates or political parties.⁸⁶ Whether expenditures are independent or coordinated is a high-stakes question given their impact upon election outcomes⁸⁷—and yet *Buckley* does not define what constitutes coordination between a candidate and an independent group.⁸⁸

Because the Court has not endorsed a bright-line coordination rule or provided a clear indication of the factors to consider, the FEC has been left to its own devices with limited and sporadic direction from Congress. The Commission operationalized the current statutory definition of coordination through a series of rulemakings, settling on a three-part test.⁸⁹ In this Part, I describe the FEC’s test for determining whether coordination has occurred, detail the safe harbor to coordination law that defenders of redboxing use to assert the practice’s legality, and assert that the practice of redboxing violates coordination law. In doing so, I aim to situate this Note’s argument about the legality of redboxing within the broader literature on coordination and independent expenditures.

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85. See *Contribution Limits for 2019-2020*, FED. ELECTION COMM’N (Feb. 2019), https://www.fec.gov/resources/cms-content/documents/contribution_limits_chart_2019-2020.pdf [<https://perma.cc/9MHZ-DTFN>]. For comparison, the average cost of a single political advertisement (aired just once) in relatively inexpensive Iowa media markets, can be up to \$10,000. Robin Opsahl, *Six Answers to Your Questions About Political Television Advertising*, DES MOINES REG. (Sept. 13, 2018, 4:35 PM), <https://www.desmoinesregister.com/story/news/politics/2018/09/13/political-ads-advertisement-campaign-spending-iowa-tv-citizens-united-super-pac-candidate-dark-money/1283739002> [<https://perma.cc/X75K-4VEQ>].
86. *Who Can and Can’t Contribute*, FED. ELECTION COMM’N, <https://www.fec.gov/help-candidates-and-committees/candidate-taking-receipts/who-can-and-cant-contribute> [<https://perma.cc/3TWF-2YCC>].
87. See Neilan S. Chaturvedi & Coleen Holloway, *Postdiluvian? The Effect of Outside Group Spending on Senate Elections After Citizens United and Speechnow.org*, 15 FORUM 251, 263 (2017) (finding outside-group expenditures play a significant but small role in determining the vote share of Senate candidates post *Citizens United*); Victoria A. Farrar-Myers & Richard Skinner, *Super PACs and the 2012 Election*, 10 FORUM 105, 109 (2012) (finding independent expenditures affect election results in the House of Representatives).
88. Briffault, *supra* note 18, at 95 (“[T]o be sure . . . *Buckley* says nothing about what it takes to establish that an independent group is coordinated with a candidate.”).
89. 11 C.F.R. § 109.21 (2021).

A. *The Three-Part Test for Coordination*

In this Section, I state the Federal Election Commission's test to find coordination and address the debates about how to interpret and apply it. The test for a coordinated communication involves meeting three disjunctive prongs: (1) payment, (2) content, and (3) conduct. The first two prongs, payment and content, are relatively straightforward. An expenditure meets the payment prong if it is paid for "in whole or in part" by someone other than a candidate or political party.⁹⁰ An expenditure satisfies the content prong if the funds in question are spent on a public communication that promotes the election or defeat of a candidate for federal office within a certain time frame close to an election.⁹¹ Most super PAC advertisements meet the content standard because they tend by nature to be electioneering communications.

The third prong, conduct, remains the primary subject of legal analysis and is the central focus of this Note. Proof of meeting any one of six standards can satisfy the conduct prong, which in turn provides necessary support for the assertion that an expenditure was actually an illegal contribution. Four of these standards are relevant to the argument presented in this Note: (1) a "[r]equest or suggestion;"⁹² (2) "[m]aterial involvement;"⁹³ (3) a "[s]ubstantial discussion;"⁹⁴ and (4) the "republishing of campaign material."⁹⁵ I address each in turn.

First, the request or suggestion conduct standard has two independently sufficient conditions.⁹⁶ The standard is met if:

- (1) The communication is created, produced, or distributed at the request or suggestion of a candidate, [the candidate's] authorized committee, or [a] political party committee; or
- (2) The communication is created, produced, or distributed at the *suggestion of a person paying for the communication* and the candidate, [the

90. *Id.* § 109.21(a)(1).

91. *Id.* § 109.21(c).

92. *Id.* § 109.21(d)(1).

93. *Id.* § 109.21(d)(2).

94. *Id.* § 109.21(d)(3).

95. *Id.* § 109.21(d)(6); *id.* § 109.23(a).

96. "Satisfying either [condition] satisfies the standard." *Making Independent Expenditures*, FED. ELECTION COMM'N, <https://www.fec.gov/help-candidates-and-committees/making-independent-expenditures> [<https://perma.cc/BB37-5923>].

candidate’s] authorized committee, or [a] political party committee *assents* to the suggestion.⁹⁷

Next, the “material involvement” standard is satisfied if a candidate or her agent is “materially involved in decisions regarding” the “content of the communication,” “intended audience,” “means or mode of the communication,” “specific media outlet used,” “timing or frequency of the communication,” or “size or prominence of a printed communication, or duration of a communication by means of broadcast, cable, or satellite.”⁹⁸ Importantly, the rule states that the material conduct standard is “not satisfied if the information material to the creation, production, or distribution of the communication was obtained from a publicly available source.”⁹⁹

Third, the FEC may also find problematic conduct when there have been substantial discussions between the person paying for the communication and the candidate or political party committee that the advertisement seeks to aid.¹⁰⁰ Whether a discussion is substantial under the test depends on the nature of information conveyed in discussions. Substantial discussions convey information about the “plans, projects, activities or needs” of the candidate that are “material to the creation, production, or distribution of the communication.”¹⁰¹ Like the material conduct standard, the substantial-discussion standard is not satisfied if information integral to the communication is obtained from a publicly available source.¹⁰²

Finally, the FEC may find coordinative conduct if an independent expenditure group republishes existing campaign material created by a candidate.¹⁰³ Republication occurs when, for example, a candidate creates an advertisement, posts it to their campaign website or on YouTube, and an independent expenditure committee then airs the *same* commercial on television.¹⁰⁴

None of the conduct standards outlined above require the FEC to find evidence of a formal agreement or arrangement between the parties involved. At

97. *Id.* § 109.21(d)(1)(i)-(ii) (emphasis added).

98. *Id.* § 109.21(d)(2)(i)-(vi).

99. *Id.* § 109.21(d)(2).

100. *Id.* § 109.21(d)(3).

101. *Id.*

102. *Id.*

103. *Id.* § 109.21(d)(6).

104. See, e.g., FEC MUR 5879 (Harry Mitchell for Congress & DCCC), Notification with Factual and Legal Analysis, at 4-8 (May 3, 2010), <https://www.fec.gov/files/legal/murs/5879/10044264888.pdf> [<https://perma.cc/2RUR-WLFT>] (describing a factual pattern in which an independent committee republished campaign materials).

Congress's direction,¹⁰⁵ the Commission's coordination regulations explicitly state that "agreement or formal collaboration between the person paying for the communication" and the individuals or groups they seek to help "is not required for a communication to be a coordinated communication."¹⁰⁶ The FEC defines agreement as "a mutual understanding or meeting of the minds on all or any part of the material aspects of [a] communication."¹⁰⁷ It similarly defines formal collaboration as "planned, or systematically organized, work on the communication."¹⁰⁸

Although evidence of a formal agreement is not required to demonstrate coordination, it is still difficult to prove that super PAC interactions with candidates or parties meet the conduct prong. Getting past the pleading stage of FEC enforcement action is difficult because it is nearly impossible to find proof of smoking-gun conduct-standard violations. Political actors understandably do not broadcast when they have had discussions or engaged in other behavior that may constitute illegal coordination. In addition, the FEC applies a high procedural burden of proof to allegations of coordination.¹⁰⁹ Bureaucratic issues have also prevented past enforcement: the Commission lacked a quorum

105. The Bipartisan Campaign Reform Act required the FEC to promulgate new coordination regulations and specifically barred a requirement that "agreement or formal collaboration" be necessary to establish coordination. Pub. L. No. 107-155, §214(c), 116 Stat 95 (Mar. 27, 2002) (codified at 52 U.S.C. § 30116 (2018)).

106. 11 C.F.R. § 109.21(e) (2021).

107. *Id.*

108. *Id.*

109. In order to prevail during an enforcement matter, a complainant must present enough evidence to overcome two distinct procedural stages. First, the complainant must present enough evidence to the General Counsel for them to make a recommendation to the Commission that there is enough evidence to find "reason to believe that a person has committed . . . a violation." 52 U.S.C. § 30109(a)(2) (2018). Next, a majority of the Commission must vote to affirm that there is reason to believe a violation has occurred. Upon such a determination, the Commission can conduct an investigation and, after that, must vote for a third time on whether there is "probable cause" that a violation has occurred. See *Guidebook for Complainants and Respondents on the FEC Enforcement Process*, FED. ELECTION COMM'N (May 2012) [hereinafter *Guidebook on the FEC Enforcement Process*], https://www.fec.gov/resources/cms-content/documents/respondent_guide.pdf [<https://perma.cc/3BYH-MFZ5>]. Regarding the high evidentiary bar to prevailing at the first stage of this process, see, for example, FEC MUR 6821 (Shaheen for Senate, et al.), First General Counsel's Report, at 2-4 (Jan. 21, 2015), <https://www.fec.gov/files/legal/murs/6821/15044382919.pdf> [<https://perma.cc/NG9Z-EPJP>] (enclosing the FEC's "Factual and Legal Analysis," which relied on the respondents' denials of impermissible coordination to dismiss the complaint); see also *infra* Section IV.B (detailing enforcement challenges).

for the better part of the last election cycle, rendering rigorous enforcement of coordination law a virtual nonstarter.¹¹⁰

While the text of the FEC regulations is clear, the interpretation and application are less so. Legal scholars have, for the last decade, debated where regulators should draw the line between permissible practices and those amounting to illegal coordination.¹¹¹ There is a lack of consensus on how to apply the three-part coordination test. Broadly, three camps have articulated answers to the question of “what conduct and contacts . . . turn an expenditure from protected speech into unprotected conduct?”¹¹²

At one end of the spectrum, former FEC Chairman Bradley A. Smith advocates for a narrow definition of coordination.¹¹³ He argues that *Buckley’s* distinction between protected “speech” (independent expenditures) and associative “conduct” (contributions) should animate the definition of coordination.¹¹⁴ The *Buckley* Court upheld contribution limits under the theory that “direct contact in the context of providing something of value” can facilitate quid pro quo corruption.¹¹⁵ Since coordinated expenditures are really in-kind contributions, Smith contends, the government can only regulate them in the same way it regulates contributions.¹¹⁶ Thus, the sole constitutional path to regulate coordination is to forbid only conduct that can give rise to a quid pro quo exchange.¹¹⁷

Michael Gilbert and Brian Barnes take issue with Professor Smith’s definition. They argue that tying coordination to the regulation of the *interactions* between candidates and independent spenders is rooted in a fallacy “of the Su-

110. R. SAM GARRETT, CONG. RESEARCH SERV., R45160, FEDERAL ELECTION COMMISSION: MEMBERSHIP AND POLICYMAKING QUORUM, IN BRIEF 7 (2020).

111. See TOKAJI & STRAUSE, *supra* note 18, at 22 (describing a debate among scholars about the tension between the commonsense meaning of the term coordination and the legal definition of improper conduct).

112. Smith, *supra* note 16, at 603, 609.

113. *Id.* Smith has coined the term “‘common sense coordination’ to distinguish the kind of signaling and communication that many . . . find troubling—but that the law allows—from illegal coordination.” TOKAJI & STRAUSE, *supra* note 18, at 65 (quoting Smith, *supra* note 16, at 603). Smith contends that illegal coordination presents an “‘opportunity for quid pro quo bargaining’ through a direct interaction between the campaign and the outside group,” whereas common-sense coordination “‘doesn’t necessarily include the opportunity to exchange money for a political favor.’” *Id.*

114. Smith, *supra* note 16, at 611.

115. *Id.* at 618.

116. *Id.*

117. *Id.* at 613, 618.

preme Court's [own] making."¹¹⁸ The fallacy is that coordination regulations can, like contribution limits, limit the value provided to the candidate.¹¹⁹ Instead, Gilbert and Barnes contend that while coordination regulations can make it hard for nominally independent spenders to convey value to candidates by getting the message just right, spending *more money* on the expenditure can often counteract any loss in value deriving from completely independent spending.¹²⁰ Therefore, they argue, coordination regulations—unlike contribution limits—do not have a direct relationship to preventing corruption and should not be regulated by the same doctrinal grounds.¹²¹

At the other end of the spectrum is Richard Briffault's suggestion that merely close relationships and common purpose between independent groups and candidates are sufficient to trigger a finding of coordination.¹²² Several scholars have criticized Briffault's interpretation of coordination law as too prohibitory. Professor Richard Hasen and preeminent political-law practitioner Bob Bauer criticize the overbreadth of Briffault's interpretation. Hasen challenges the assertion that structural links and a shared purpose are sufficient to find coordination.¹²³ He contends instead that the law requires "explicit interactions" between independent groups and candidates to find coordination.¹²⁴ But those interactions, he contends, need not be related to the content of the communication.¹²⁵ Instead, even a candidate helping to fundraise for a super PAC can violate the law because it "by definition is coordinating its fundraising strategy with that group."¹²⁶ Bauer critiques Briffault's view of coordination in a slightly different way than Hasen. Like Hasen, he argues that the law requires explicit interactions between candidates and independent spenders.¹²⁷ However, Bauer argues that independent groups coordinate with candidates when

118. Gilbert & Barnes, *supra* note 16, at 402.

119. *Id.* at 401-02.

120. *Id.*

121. *Id.* at 422-23.

122. Briffault, *supra* note 18, at 97-100.

123. Hasen, *supra* note 16, at 19-21.

124. *Id.* at 20.

125. *Id.*

126. *Id.*

127. Bob Bauer, *Coordinating with a Super PAC, Raising Money for It, and the Difference Between the Two*, MORE SOFT MONEY HARD L. (Jan. 27, 2014), <http://www.moresoftmoneyhardlaw.com/2014/01/coordinating-super-pac-raising-money-difference-two> [https://perma.cc/VEJ9-ZF3N].

they interact in ways that provide candidates with control or involvement over “the core organizational strategy for persuading voters.”¹²⁸

Striking a similar chord to Bauer’s view that interactions regarding messaging and strategy amount to illegal coordination, Brent Ferguson proposes a middle-of-the-road definition. Ferguson argues that coordination occurs once a candidate has taken actions to demonstrate the perceived value of an expenditure.¹²⁹ Along those lines, Briffault remarked on why candidates should ever meet when they can tweet.¹³⁰ That is, candidate interviews, their public statements, and the candidate’s own communications to voters can provide super PACs with all the information they need to add value to a candidate.¹³¹ Briffault stops short of endorsing the position that public communications that help candidates should be treated as coordinative without evidence of significant interaction between the candidate and the independent group.¹³² However, under Bauer’s and Ferguson’s goldilocks views of coordination,¹³³ a practice such as redboxing would likely be illegal despite its public nature because candidates share their ideal messaging strategy with the intent to demonstrate the value a given expenditure would have to the candidate.¹³⁴

The debates over the interpretation of coordination law are largely unresolved—and the FEC has not taken action to clarify the law. As such, engaging in illegal conduct—or conduct in a legal gray area—is a gamble many political actors are willing to take.¹³⁵ In the next section, I discuss the safe harbor for

128. *Id.*

129. Brent Ferguson, *Beyond Coordination: Defining Indirect Campaign Contributions for the Super PAC Era*, 42 HASTINGS CONST. L.Q. 471, 497-98 (2015).

130. Bob Bauer, *Professor Briffault on Super PACs and the Question of “Coordination,”* MORE SOFT MONEY HARD L. (May 8, 2013), <http://www.moresoftmoneyhardlaw.com/2013/05/professor-briffault-on-super-pacs-and-the-question-of-coordination> [https://perma.cc/6GG6-8EKJ].

131. Briffault, *supra* note 18, at 94.

132. *Id.*

133. Bauer’s and Ferguson’s definitions of coordination seem to be neither too restrictive nor too permissive—hence the “goldilocks” designation.

134. See *infra* Section II.C discussing the legality of redboxing.

135. See TOKAJI & STRAUSE, *supra* note 18, at 67 (describing how interviews with campaign operatives reveal they view the legality of online signaling tactics as a “gray area where the law is not so clear and the potential risks are worth taking . . . [especially considering the] repeated deadlocks by the FEC on the question”); Gilbert & Barnes, *supra* note 16 at 418 (“Coordination regulations do *not* deter outsiders with lots of money from engaging in very lucrative—and presumably very harmful—corruption.”). When Larry Noble was General Counsel of the FEC, he commented:

publicly available information. Those who claim redboxing is legal under current law often use this safe harbor to justify use of the practice.

B. The Safe Harbor for Publicly Available Information

No set of restrictions can bar donors, candidates, party staff, and outside groups from all communication with each other. These individuals operate in the same circles. They attend the same briefings, events, luncheons, and dinners, and may even co-host fundraisers together.¹³⁶ In addition, candidates and parties are often in the news, telegraphing their campaign messages and plans on front pages and in interviews.¹³⁷ Acknowledging “[t]he practical reality . . . that an intelligently planned independent expenditure effort will always employ similar themes and issues” and will “attack the same weaknesses of the opponent as the campaign of the beneficiary candidate,” the FEC carved out a safe harbor for publicly available information to the conduct standards.¹³⁸

The safe harbor for publicly available information exempts a “communication created with information found” publicly—“for instance, on a candidate’s or political party’s Web site, or learned from a public campaign speech”—from

The argument is that violating the law has become the cost of doing business. I can tell you in many cases this is true. I have talked to enough lawyers who represent candidates who say that the classic conversation in the campaign room consists of someone asking, “We want to do this and this. What are the consequences?” Then the lawyer responds by saying, “We cannot do that. It is illegal. After the election, the FEC will go after you.” To which the questioner asks, “What is the fine?” Even if the penalty is a \$20,000 fine, he is thinking, “But this action will win the election. All right, thank you. Leave the room, please.” I am serious. That scenario happens, and the lawyers get up and leave the room.

Federal Election Commission Panel Discussion: Problems and Possibilities, 8 ADMIN L.J. AM. U. 223, 232 (1994).

136. See Note, *supra* note 18, at 1478.

137. See, e.g., FEC MUR 5506 (Castor for Senate), First General Counsel’s Report, at 7 (Nov. 13, 2015), <https://www.fec.gov/files/legal/murs/5506/0000483A.pdf> [<https://perma.cc/Z696-WMST>] (“The Castor Committee . . . states that it made its decisions about placing and pulling ads based on information that television stations are required to make public.”); Adam Orr, *5th District Candidates Spar over Guns and Trump*, GASTON GAZETTE (Oct. 28, 2020, 10:56 AM), <https://www.gastongazette.com/news/20201028/5th-district-candidates-spar-over-guns-and-trump> [<https://perma.cc/V8QG-WAFE>] (discussing the two candidates’ top priorities: for one candidate, healthcare; for the other, veterans and education).

138. FEC MUR 2766 (Auto Dealers and Drivers for Free Trade Political Action Committee), Supporting Memorandum for the Statement of Reasons from Commissioner Thomas J. Josefiak, at 23 (June 13, 1990), <https://www.fec.gov/files/legal/murs/2766.pdf> [<https://perma.cc/Z7CL-Z6GC>].

meeting some of the conduct standards discussed in the previous Section.¹³⁹ Publicly available sources include, but are not limited to, newspaper or magazine articles, candidate speeches or interviews, press releases, a candidate or political party’s website, or any publicly available website.¹⁴⁰

Importantly, while the safe harbor applies to the “material involvement” and “substantial discussion” conduct standards, the Commission *expressly denied* application of the safe harbor to the “request or suggestion” standard.¹⁴¹ During the notice and comment period for FEC rulemaking on the test for coordinated communications, the Commission received comments that “expressed concern that the safe harbor . . . would preclude certain communications from satisfying the coordinated communications test simply because a portion of a given communication was based on publicly available information, even if a candidate privately conveyed a request that a communication be made.”¹⁴²

In the next Section, I argue that the practice of redboxing is illegal under current law. Candidates, political parties, and independent spenders understand the act of posting a redbox as a request or suggestion for an expenditure. Because redboxes are requests or suggestions for an advertisement from an independent expenditure group, the public nature of the practice does not protect its use. As such, expenditures made pursuant to a redbox should be treated as contributions and subjected to both federal dollar limits and disclosure requirements. In the following Section, I demonstrate how redboxes facilitate illegal contributions and violate the FEC’s test for coordination.

C. Redboxes Facilitate Unlawful Contributions.

Redboxes are more than an attempt to sway voters who stumble upon a campaign’s website. They are instead a carefully curated communication tool designed to instruct outside groups on the candidate’s preferences for advertising content, desired audience, timing, and other strategic information.¹⁴³ Since redboxes, by definition, involve posting a message about a candidate or her opponent to constitute the intended content of an outside group’s communica-

139. Coordinated Communications, 71 Fed. Reg. 33190, 33205 (June 8, 2006) (codified at 11 C.F.R. pt. 109 (2021)).

140. *Id.*

141. *Id.* (“The new safe harbor [for publicly available information] does *not* apply to the ‘request or suggestion’ conduct standard in 11 C.F.R. 109.21(d)(1).” (emphasis added)).

142. *Id.*

143. *See supra* Section I.A (discussing the origins of the practice).

tion, those who defend the practice as legal claim that redboxes, if anything, look most like the “material involvement” or “substantial discussion” conduct standards.¹⁴⁴ Therefore, proponents assert the legality of redboxes under the safe harbor for publicly available information, which precludes communications made on a candidate’s or political party’s public website from violating those two conduct standards.¹⁴⁵ However, in spite of the public nature of redboxes, the safe harbor for publicly available information does not apply, and redboxes instead more closely resemble requests or suggestions for communications, which the FEC expressly exempts from the safe harbor.¹⁴⁶ The practice’s “magic signals” transform an innocent message on a candidate’s website into an illegal request for a communication from a super PAC. These cues have evolved over the last decade solely to bolster unlawful coordination between regulated committees and deregulated super PACs.¹⁴⁷ The illegality of redboxing under federal law grows clear when one applies the FEC’s three-part test for coordination to the practice. Complainants will easily satisfy the payment and content prongs.¹⁴⁸ This Section concerns itself with the third and more challenging prong—whether redboxing satisfies the request or suggestion conduct standard.

Redboxing satisfies the request or suggestion conduct standard codified at 11 C.F.R. § 109.21(d)(1). Expenditures satisfy the standard if the person who “created, produced, or distributed” the communication does so “at the request or suggestion of a candidate” or “political party committee.”¹⁴⁹ The FEC’s comments on the conduct standard, along with Supreme Court precedent on related rulemakings, point to an expansive definition of the words “request” and “suggest,” one which encompasses unspoken signals. During the rulemaking process, the FEC received comments asking it to provide more detail on the

144. See, e.g., FEC MUR 6908 (National Republican Congressional Committee), Response to Complaint, at 5-6 (Jan. 27, 2015), <https://www.fec.gov/files/legal/murs/6908/19044463548.pdf> [<https://perma.cc/MFU9-5UHJ>]; FEC MUR 6821 (Shaheen for Senate, et al.), Response to Complaint, at 4 (July 7, 2014), <https://www.fec.gov/files/legal/murs/6821/15044382906.pdf> [<https://perma.cc/CQC4-9FMX>].

145. See sources cited *supra* note 144.

146. The safe harbor for publicly available information does not apply to the request or suggestion conduct standard. See 11 C.F.R. § 109.21(d) (2021); see also Coordinated Communications, 71 Fed. Reg. 33190, 33205 (June 8, 2006) (describing the scope of the safe harbor).

147. See *supra* Sections I.A, I.B.

148. To prove the payment prong is met, complainants only need to prove that someone other than the candidate paid for the advertisement. The content prong is similarly easy to meet: most advertisements that advocate for the election or defeat for a candidate for federal office will meet the prong. See *supra* Section II.A.

149. 11 C.F.R. § 109.21(d)(1).

definition of “suggest” included in the conduct standard.¹⁵⁰ The FEC deemed significant elaboration unnecessary, explaining that the term “has existed in the Commission’s regulations without further definition for over two decades” and is defined as made “in cooperation with or at the consent of” a candidate or political party.¹⁵¹

Similarly, the Supreme Court and D.C. Circuit have endorsed expansive interpretations of “request” and “suggest” in cases reviewing related coordination statutes and regulations. For instance, in *McConnell v. Federal Election Commission*, the plaintiffs challenged the statutory definition of coordination in the Bipartisan Campaign Reform Act as unconstitutionally vague.¹⁵² The Court dismissed this assertion and instructed that the meaning of the phrase “at request or suggestion of . . . delineates its reach in words of common understanding.”¹⁵³ A request or suggestion need not be explicit. The Court in *McConnell* reaffirmed an earlier holding that a “wink or nod” is sufficient to constitute a request or suggestion.¹⁵⁴

The D.C. Circuit has also eschewed a narrow interpretation of the terms “request” or “suggest” in its review of a related rulemaking about FEC rules that prohibit political parties from soliciting or directing contributions.¹⁵⁵ In *Shays v. Federal Election Commission*, the D.C. Circuit recognized that the FEC had promulgated rules that defined the terms “solicit” and “direct” to “mean ‘ask.’”¹⁵⁶ The FEC’s limited definition of “ask” meant only “some affirmative verbalization or writing.”¹⁵⁷ The court remarked that if “[r]ead this way . . . the rule permits national parties, candidates and officeholders to funnel” unregulated funds into “different organizations by simply not ‘asking’ the donors to do so, but using more nuanced forms of solicitation.”¹⁵⁸ This restrictive definition “leav[es] unregulated a ‘wide array of activity’” such as “coded statements”

150. Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 431 (Jan. 3, 2003).

151. *Id.* (quoting *Buckley v. Valeo*, 424 U.S. 1, 47 (1976) (internal quotation marks omitted)).

152. *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 222 (2003), *overruled on other grounds by* *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010).

153. *Id.* (quoting *Cameron v. Johnson*, 390 U.S. 611, 616 (1968) (internal quotation marks omitted)).

154. *Id.* at 221 (quoting *Fed. Election Comm’n v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431 (2001)).

155. *Shays v. Fed. Election Comm’n*, 414 F.3d 76, 103-07 (D.C. Cir. 2005).

156. *Id.* at 103 (emphasis added) (quoting 11 C.F.R. § 300.2(m)-(n) (2021)).

157. *Id.*

158. *Id.* at 103 (internal quotation marks omitted).

or “winks and nods.”¹⁵⁹ In turn, the court held that such a narrow construction clearly violates Congress’s intended definitions of “solicit” and “direct,” which the court understood to broadly encompass indirect requests in light of the broad and expansive meaning of “suggest.”¹⁶⁰

Redboxes are the internet’s version of a wink or a nod. Candidates and party committees who post redboxes “request” or, at the very least, “suggest” that an outside group create an advertisement. Industry players admit to being able to recognize that the “magic signals”¹⁶¹ indicate a request or suggestion to communicate the message alongside the signals.¹⁶² These signals—the colored box, the phrase “voters need to know,” back-up or production elements, employing a dedicated microsite, and targeting information—are standardized across campaigns, and the more “magic signals” that are present, the more confident an independent spender can be that the candidate or party is making a request. When interpreted together, they become more than a coincidence but, instead, a clearly communicated signal to eagerly awaiting independent spenders.

Defenders of redboxing argue that general, public requests do not satisfy the request or suggestion standard.¹⁶³ They assert that when promulgating the rule, the FEC explained that it “intended [the request or suggestion standard] to cover requests or suggestions made to a *select* audience, but not those offered to the public generally.”¹⁶⁴ According to the Commission in a 2003 rulemaking, “a request that is posted on a web page that is available to the general public is a request to the general public and does not trigger” the request or suggestion conduct standard.¹⁶⁵

However, a redbox is *not* a generalized request—it communicates to a specific audience. The average voter does not know that the “magic signals” exist or how to interpret their subtle call to action. Similarly, these voters would have no use for targeting information, B-roll footage or back-up documents that can validate claims and protect a PAC from legal exposure, or all of the

159. *Id.* at 104, 106.

160. *Id.* at 104, 106-07.

161. Discussed *supra* Section I.B.

162. Telephone Interview with a Political Consultant, *supra* note 20; *see also* DocDawg, *supra* note 42; Goldberg, *supra* note 42; Sullivan, *supra* note 42.

163. *See, e.g.*, FEC MUR 6908 (National Republican Congressional Committee), Response to Complaint, *supra* note 144. FEC MUR 6821 (Shaheen for Senate, et al.), Response to Complaint, *supra* note 144, at 5.

164. Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 432 (Jan. 3, 2003) (emphasis added).

165. *Id.*

other information that these redboxes communicate. Instead, identifying coded redbox requests requires inside knowledge that certain signals are posted to convey a request or suggestion.

This interpretation also coincides with the position of the FEC General Counsel according to a recently closed enforcement action.¹⁶⁶ The matter under review (MUR) concerned the NRCC's use of a Twitter account to impermissibly coordinate with two closely aligned Republican super PACs: American Action Network (AAN) and American Crossroads.¹⁶⁷ The FEC General Counsel's office recommended the Commissioners pursue enforcement action based on violation of the request or suggestion conduct standard, and the complaint's fact pattern closely tracks the practice of redboxing.¹⁶⁸ The complaint alleged that, in 2014, NRCC used two Twitter accounts to deliver a series of letters and numbers, "which would look like gibberish to most people, but actually conveyed polling results" to affiliated super PACs.¹⁶⁹ The NRCC also posted tweets with polling results for fifty-one congressional races.¹⁷⁰ The coded requests did not mention any specific super PAC by name,¹⁷¹ but the NRCC and two super PACs, AAN and American Crossroads, made a total of thirteen independent expenditures in response.¹⁷² The General Counsel's office argued that, despite being posted on Twitter and therefore technically located on a public website, the information at issue here was not public because "members of the public, without inside information, could not reasonably locate it or understand it."¹⁷³

The same logic applies to redboxes. Although they are similarly located in plain sight on campaign websites, their signals transform messages for supposed public consumption into coded instructions for outside groups. This is even more the case for redbox microsites like DemocratFacts.org, which are purposefully segregated from the official committee's website and difficult to find online unless one knows what she is looking for.¹⁷⁴ The FEC General

166. See FEC MUR 6908 (National Republican Congressional Committee), First General Counsel's Report, at 1 (Nov. 13, 2015), <https://www.fec.gov/files/legal/murs/6908/19044463608.pdf> [<https://perma.cc/M5U8-XG46>].

167. *Id.*

168. *Id.* at 2.

169. *Id.*

170. *Id.* at 6.

171. *Id.* at 6-7.

172. *Id.*

173. *Id.* at 9.

174. See DEMOCRAT FACTS, *supra* note 51.

Counsel's Report called websites similar to DemocratFacts.org and the type of signaling the NRCC engaged in through Twitter "the internet equivalent of a dead drop."¹⁷⁵ And it expressly denied that the Commission sanctioned these types of tactics in the 2003 rulemaking simply because the messages could be found online.¹⁷⁶

The FEC agreed with the proposition that non-explicit requests, or implicit signals, qualify under the request or suggestion conduct standard. The NRCC had argued that the Twitter postings, "a series of polling numbers," cannot themselves be construed as requests or suggestions.¹⁷⁷ However, the General Counsel reasoned that "because the data was posted in a cryptic format" there was reason to believe the NRCC "may have engaged in these discussions in connection with a request or suggestion."¹⁷⁸ The General Counsel's office recommended that "[s]uch secret exchanges remain private even when the information conveyed is hidden in plain sight."¹⁷⁹ The same logic follows for redboxes and the practice's "magic signals." The meaning behind these cues remains private (or at least, private to a class of political operatives) even if the signals themselves are placed on public websites.

Finally, defenders of redboxing argue that the practice cannot constitute a request or suggestion in violation of the regulation because redboxes are just one of many factors independent groups use when they decide to create an advertisement. They also contend that any congruence between postings on candidates' public websites and advertisements is coincidental—or, at the least, it is impossible to know whether they are coincidental or not.¹⁸⁰ When asked about whether his super PAC considers redboxes when deciding how to make expenditures, Ty Matsdorf, the once-spokesman for Senate Majority PAC (SMP), asserted that the independent group looks "at a multitude [of] data points: polling, both public and private, research, what the news media is reporting, what candidates and campaigns are saying on both sides, what local and national issues are relevant, what other groups on either side of the aisle

175. First General Counsel's Report, *supra* note 166, at 10; *see also id.* at 10 n.39 ("Leaving a hidden message in a 'public' place where only select individuals will notice it or understand it is a classic method of covert information exchange.").

176. *See id.* at 10.

177. *Id.* at 23.

178. *Id.*

179. *Id.* at 10.

180. FEC MUR 6908 (National Republican Congressional Committee), Response to Complaint, *supra* note 144, at 3 (disclaiming reliance on the allegedly coordinated information to make decisions about expenditures and also claiming to have "no information" as to whether the decision-makers viewed the allegedly coordinated information before making expenditures).

have been saying.”¹⁸¹ He explained how “all of these factors [are used] to determine what message [SMP] should be delivering in [their] ads, where [they] should be delivering them, through what medium, and when.”¹⁸² Dan Conston, a spokesman for one of the super PACs allegedly involved in the NRCC’s Twitter scheme, took a similar position. He acknowledged that while his group is “certainly aware of what DemocratFacts[.org] says, and [the site] has informed messages to test in polling,” its “advertising . . . [is] based first and foremost off survey research, off the polling.”¹⁸³

However, the FEC has made clear that outside groups do not need to follow the request or suggestion word-for-word in order for an expenditure to meet the conduct standard. After all, “the ‘request or suggestion’ conduct standard concerns *only* a . . . request or suggestion that a communication be created, produced or distributed.”¹⁸⁴ A candidate who uses redboxes intends to request an advertisement from an outside group.¹⁸⁵ Whether the outside group decides to create the advertisement using *only* the information provided in the redbox message has no bearing on the reality that a request was made. That a recorded bargain—the redbox—links the spender and the candidate is all that matters for purposes of the request or suggestion standard.

To create a nominally independent communication based on a redbox transforms the communication into an in-kind contribution. It should be treated as such and subject to strict monetary limits and disclosure requirements. The following Part provides additional support for why these communications should be regulated as in-kind contributions—a normative argument that draws upon theories of political corruption and the harms of redboxing.

III. THE HARMS OF REDBOXING

Coordination law transforms expenditures made pursuant to a redbox into contributions to candidates. Accordingly, these nominally independent expenditures impose the same harms upon the political system as contributions do. But redboxes, and their role in routinizing a system of candidate and super PAC coordination, also uniquely harm traditional accountability mechanisms of political speech by allowing candidates to avoid internalizing the monetary

¹⁸¹. See Sullivan, *supra* note 42.

¹⁸². *Id.*

¹⁸³. Roarty, Goldmacher & National Journal, *supra* note 42.

¹⁸⁴. Coordinated Communications, 71 Fed. Reg. 33,190, 33,205 (June 8, 2006) (codified at 11 C.F.R. pt. 109 (2021)) (emphasis added).

¹⁸⁵. For discussion, see *supra* Section I.A.

and reputational costs of their speech. In this Part, I discuss each of these harms in turn, arguing that as a result of each of the discrete harms of the practice, redboxing contributes to ongoing polarization within, and between, the two major political parties. In Section III.A, I discuss how redboxes implicate the threat of actual and apparent quid pro quo corruption, and argue that this corruption can fuel the ideological polarization of candidates. Next, Section III.B details how redboxes allow candidates to evade internalizing the monetary and reputational costs of their negative political speech. I assert that a regime in which candidates can shirk the personal costs of their own speech increases the toxicity of campaign discourse and can drive interparty polarization.

A. Threat of Actual and Apparent Quid Pro Quo Corruption

As with direct contributions to candidates, redboxing implicates a threat of quid pro quo corruption and its appearance. The normative theory underlying coordination rules is that “[t]he absence of prearrangement and coordination of an expenditure with a candidate” can “alleviate[] the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate.”¹⁸⁶ This is to prevent the capture of candidates, and in turn, the legislative process, by a donor class with whom candidates have struck political deals. Redboxes facilitate the possibility of a quid pro quo exchange, as the practice allows candidates and political parties to create the possibility of an implicit bargain with the donors who fund independent expenditure committees. Because the “magic signals” are known requests for an advertisement when placed beside a message from a candidate on a political website, redboxes are the functional equivalent of spoken instructions from a candidate to a super PAC. Therefore, redboxes can facilitate the same threat of quid pro quo corruption as contributions do. Redboxes can facilitate quid pro quo corruption between individual candidates and super PAC donors as well as slates of candidates and super PAC donors. Additionally, and perhaps most counterintuitively, redboxing can facilitate corruption of candidates by the political party organizations to which they belong, contributing to increased levels of ideological polarization.

First, redboxes allow candidates and donors to engage in traditional dyadic corruption, whereby a single donor gives to a super PAC—just as they would to the candidate’s campaign—and seeks a favor from the candidate in return.¹⁸⁷

¹⁸⁶ *Buckley v. Valeo*, 424 U.S. 1, 47 (1976).

¹⁸⁷ See, e.g., Nicholas Confessore & Matt Apuzzo, *Robert Menendez Indictment Points to Corrupting Potential of Super PACs*, N.Y. TIMES (Apr. 2, 2015), <https://www.nytimes.com/2015/04/03/us/politics/robert-menendez-indictment-points-to-corrupting-potential-of-super-pacs.html> [https://perma.cc/23VT-L2HF].

Proponents of the current regime might respond by noting that because super PACs are not required to disclose individual donors, corruption is *less likely*.¹⁸⁸ They argue that if a candidate does not know who donated to her, she cannot be indebted. Some super PACs do not even disclose their donors until *after* the election.¹⁸⁹ Others disclose over the course of the election, but funnel individual donations through 501(c)(4) tax-exempt organizations, which are themselves not required to disclose donors under new Internal Revenue Service (IRS) rules.¹⁹⁰ However, super PAC donors' aversion to sunlight does not foreclose the possibility that they will come to collect on their donations with candidates in private. Super PACs often engage in collaborative fundraising with candidates.¹⁹¹ And "lawmakers are likely to be quite aware of who funded the super PAC spending that helped them win."¹⁹²

In addition, the pool of donors to super PACs is astonishingly small.¹⁹³ And many of these donors already max out their individual donations to the

188. This argument is not novel; it follows a decades-old pro-anonymity school of thought arguing that "anonymous donations . . . might make it harder for candidates to *sell* access or influence because they would never know which donors had paid the price." Ian Ayres & Jeremy Bulow, *The Donation Booth: Mandating Donor Anonymity to Disrupt the Market for Political Influence*, 50 STAN. L. REV. 837, 838 (2005). After all, as one of the leading scholars on this issue contends, "[k]nowledge about whether the other side actually performs his or her promise is an important prerequisite of trade." Ian Ayres, *Disclosure Versus Anonymity in Campaign Finance*, 42 NOMOS 19, 20 (2000).

189. See, e.g., Maggie Severns, 'Oh That's Cool—Do That!': Super PACs Use New Trick to Hide Donors, POLITICO (Aug. 17, 2018, 5:06 AM EDT), <https://www.politico.com/story/2018/08/17/super-pacs-hidden-donors-disclosures-741795> [<https://perma.cc/7LWY-8HL3>].

190. For an empirical analysis of how super PACs use 501(c) groups to obscure the identity of their donors, see Daniel E. Chand, *Anonymous Money in Campaigns: Is Sunlight the Best Disinfectant?*, 13 FORUM 269, 281-85 (2015). For a summary of the Internal Revenue Service (IRS) rule stating that 501(c) groups need not disclose the identity of individual donors, even to the Treasury Department, see Press Release, Treasury Dep't, Treasury Department and IRS Announce Significant Reform to Protect Personal Donor Information to Certain Tax-Exempt Organizations (July 16, 2018), <https://home.treasury.gov/news/press-releases/sm426> [<https://perma.cc/7K2W-DNHW>].

191. See, e.g., Peter H. Stone, *Democrats and Republicans Alike Are Exploiting New Fundraising Loophole*, CTR. FOR PUB. INTEGRITY (May 19, 2014), <https://publicintegrity.org/politics/democrats-and-republicans-alike-are-exploiting-new-fundraising-loophole> [<https://perma.cc/H5JG-PJSL>].

192. Diana Dwyre & Evelyn Braz, *Super PAC Spending Strategies and Goals*, 13 FORUM 245, 261 (2015).

193. Asher Stockler, *Nearly Half of All Individual Donations to Super PACs Were Made by 25-Mega Wealthy Donors, New Report Says*, NEWSWEEK (Jan. 15, 2020, 6:08 PM EST), <https://www.newsweek.com/super-pac-donations-citizens-united-report-1482436> [<https://perma.cc/9M4L-BLG4>].

candidates themselves before giving to a super PAC.¹⁹⁴ These donors make themselves known to candidates at fundraising events,¹⁹⁵ and candidates frequently host conference calls with super PAC donors.¹⁹⁶ Moreover, public disclosure and private disclosure have very different incentive structures. It is folly to assume that frustrating avenues for public disclosure means that super PAC donors do not clamor to share their support with the lawmakers they help elect. Redboxes help to clarify and crystallize these potentially corruptive bargains.

Second, redboxes can facilitate quid pro quo corruption at a group level.¹⁹⁷ Analytically, “the risk of quid pro quo corruption is . . . little different for a cartel of candidates and officeholders than it is for individuals.”¹⁹⁸ Redboxes allow super PACs to contribute to an entire slate of candidates at once,¹⁹⁹ with party microsites serving as one-stop political shopping for super PAC donors.

Finally, closer examination of super PACs’ spending trends reveals that redboxes uniquely implicate an additional risk: that of potential quid pro quos between *parties* and *their own candidates*. Shortly after *Citizens United*, Professor Heather Gerken raised concerns regarding the potential for super PACs closely affiliated with the major political parties to supplant the parties’ traditional functions, acting as “shadow parties.”²⁰⁰ These shadow-party super PAC organizations are structurally indistinguishable from parties²⁰¹—often hiring the same staffers²⁰² and housing the party’s elite.²⁰³ But unlike the traditional party

194. Paul Harris, *Super Pac Donors Often Max out on Individual Donations, Study Finds*, GUARDIAN (Feb. 21, 2012, 4:15 PM EST), <https://www.theguardian.com/world/2012/feb/21/super-pac-donors-individual-donations> [<https://perma.cc/N6X6-DAS7>].

195. See Note, *supra* note 18, at 1485.

196. See, e.g., Brian Slodysko, *Shadow Group Provides Sanders Super PAC Support He Scorns*, ASSOCIATED PRESS (Jan. 7, 2020), <https://apnews.com/article/345bbd1af529cfb1e41305fa3ab1e604> [<https://perma.cc/TM3Y-6GT9>].

197. Professor Michael S. Kang develops a “group-based theory of corruption” to account for the possibility that quid pro quo corruption can take place at a larger scale. Wealthy donors can corrupt slates of candidates by the same mechanism that can corrupt single candidates. See Kang, *Brave New World*, *supra* note 15, at 560, 571-72.

198. Michael S. Kang, *Party-Based Corruption and McCutcheon v. FEC*, 108 NW. L. REV. 240, 241 (2014).

199. See Kang, *Brave New World*, *supra* note 15, at 563-66; see also Kang, *supra* note 198, at 250 (discussing the risk of quid pro quo transactions at the “collective party-based level”).

200. Gerken, *supra* note 15, at 915-17.

201. See generally Richard M. Skinner, Seth E. Masket & David A. Dulio, *527 Committees and the Political Party Network*, 40 AM. POL. RES. 60 (2012) (charting the structural links between traditional parties and shadow parties).

202. See *supra* note 28 and accompanying text.

committees, they can raise unlimited funds from individual donors free from strict disclosure requirements.²⁰⁴ Dean and Professor Gerken’s principal concern was that the rise of shadow-party super PACs would serve to prioritize the legislative will of party elites at the expense of the rank-and-file “party faithful.”²⁰⁵ I assert that studying redboxing, and the implications of the practice, might assuage some of Professor Gerken’s worries. Redboxing suggests traditional parties are alive and well—and in fact, in the post-*Citizens United* landscape, parties are accruing power, not ceding it. However, strong political parties, armed with the practice of redboxing, implicate an equally disturbing risk: the increasing ideological polarization of elected officials.

The rise of redboxing suggests that traditional political parties have become integral intermediaries between candidates and super PACs, due in part to the parties’ role in the collection, aggregation, and publication of redboxes.²⁰⁶ The parties’ redbox microsites act as clearinghouses, conferring benefits to only those candidates who receive their respective party’s endorsement for super PAC support.²⁰⁷ A routinized system of redboxing, led by the traditional party organization, stands in contrast to Professor Gerken’s hypothesis that shadow-party super PACs work to *displace* the role of the traditional party. An orchestrated system of communication through redboxes instead suggests that traditional party organizations wield considerable influence over shadow-party super PACs. In the opinion of one campaign staffer, shadow parties follow the lead of the traditional parties: “where the DCCC prioritizes a race, the House Majority PAC will soon follow.”²⁰⁸

This threat does not stem from concerns that *Citizens United* has weakened the party system. Instead it follows from the fear that parties have actually *gained* clout in the super PAC era through newfound access to bottomless super PAC coffers, bringing with it the potential to corrupt candidates.²⁰⁹ The parties

203. Gerken, *supra* note 15, at 905.

204. *Id.* at 918.

205. *Id.* at 921-22.

206. See *supra* text accompanying notes 50-51.

207. See, e.g., TOKAJI & STRAUSE, *supra* note 18, at 47.

208. *Id.*

209. My theory that redboxing is endemic to a campaign-finance system characterized by powerful political parties, and that strong parties actually *contribute* to ideological polarization, challenges the conclusion drawn by political scientists Raymond J. La Raja and Brian F. Schaffner in their seminal work. See RAYMOND J. LA RAJA & BRIAN F. SCHAFFNER, CAMPAIGN FINANCE AND POLITICAL POLARIZATION: WHEN PURISTS PREVAIL 134-38 (2015). La Raja and Schaffner argue that to reduce ideological polarization, “limits on contributions to the political parties should be relatively high or nonexistent.” *Id.* at 137. I argue that studying redbox-

can use redboxes as a tool of legislative obedience, inviting the possibility for quid pro quo corruption between parties and the candidates who receive super PAC support at the behest of the party's redbox. Shadow party committees may not prioritize spending on a candidate disliked by the party or its leadership. Candidates who want help come election time may vote in line with their party's leadership for fear of losing this significant source of funding. This should be alarming because rigid adherence to the party line is correlated with high ideological polarization.²¹⁰

In addition to creating the possibility for quid pro quo bargains, redboxing generates the *appearance* of corruption – an analytically and normatively distinct problem. In *Buckley*, the Court asserted that “the impact of the appearance of corruption stemming from public awareness of abuse inherent in a regime of large individual financial contributions” is of “almost equal concern as the danger of quid pro quo corruption.”²¹¹ The purposefully public practice of redboxing contributes to the *appearance* that federal elections are rife with corruption. Campaigns intentionally post redbox signals on public webpages frequented by voters hoping to find out more about candidates and parties. The general public is slowly becoming familiar with redboxing thanks to recent investigative reports.²¹² Media coverage²¹³ and complaints of coordination by political opponents²¹⁴ can publicly highlight requests hidden in plain sight – like redboxing or the NRCC's coded Twitter – creating the appearance that the campaign-finance system tolerates corruption and undermining public confidence in our election laws. Candidates appear to dictate strategy and make requests of outside groups without retribution or a second glance by regulators. And the FEC's reported gridlock only adds to the perception that the agency routinely underenforces coordination laws.²¹⁵ For example, the similarities between

ing and its associated harms suggests that there is reason to doubt that funneling money through parties will prevent polarization to the extent to which La Raja and Schaffner posit.

210. Cf. Gary C. Jacobson, *Party Polarization in National Politics: The Electoral Connection*, in *POLARIZED POLITICS: CONGRESS AND THE PRESIDENT IN A PARTISAN ERA* 9 (Jon R. Bond & Richard Fleisher eds., 2000).
211. *Buckley v. Valeo*, 424 U.S. 1, 27 (1976).
212. See, e.g., *supra* note 162 and accompanying text.
213. See, e.g., Elena Schneider, *Democratic Candidates' Super PAC Smoke Signals*, POLITICO (July 15, 2016, 10:00 AM EDT), <https://www.politico.com/tipsheets/morning-score/2016/07/democratic-candidates-super-pac-smoke-signals-215346> [<https://perma.cc/5B76-MJWL>].
214. See, e.g., Complaint, *supra* note 75.
215. See generally OFFICE OF COMM'R ANN M. RAVEL, *DYSFUNCTION AND DEADLOCK: THE ENFORCEMENT CRISIS AT THE FEDERAL ELECTION COMMISSION REVEALS THE UNLIKELIHOOD OF DRAINING THE SWAMP* 2 (Feb. 2017), <https://www.fec.gov/resources/about-fec>

redbox requests and super PACs ads create the illusion that candidates and parties have unfettered access to super PAC funds.²¹⁶ The practice fosters the appearance of quid pro quo corruption, even if no actual quid pro quo corruption exists. In doing so, redboxing can serve to deteriorate public trust in the political system.

B. Erosion of Accountability Mechanisms for Negative Political Speech

All contributions to candidates risk fostering quid pro quo bargains. But contributions made pursuant to a redbox pose a unique and particularly dangerous threat to the democratic process. Redboxes allow candidates to communicate their messages to voters without internalizing the monetary and reputational costs of their political speech. This regime erodes traditional accountability mechanisms (attribution and disclosure), corrodes the tone of political discourse, and contributes to political polarization. First, the use of redboxes frustrates voters' ability to hold candidates accountable for their speech. It is no coincidence that each of the examples of redboxing presented in this Note involve candidates who use redboxes to request *negative* advertisements from independent groups. Plainly put: negative ads work. Stimulating emotions of anger and fear mobilize and persuade the electorate more effectively than cultivating positive emotions.²¹⁷ However, candidates who air negative advertisements often face a "backlash effect" for their decision to go negative, in which viewers "develop negative feelings toward the sponsor of the advertising."²¹⁸

Redboxes allow candidates to systematically outsource the dirty business of negative advertising to super PACs, and keep their own hands clean.²¹⁹ Ads

/commissioners/ravel/statements/ravelreport_feb2017.pdf [https://perma.cc/ER63-AKPU] (detailing "the serious consequences of gridlock" on the FEC's enforcement operations).

216. See, e.g., First General Counsel's Report, *supra* note 109, at 2-4 (showing similarities between the candidate's redbox and the script of the super PAC advertisement).
217. Nicholas A. Valentino, Ted Brader, Eric W. Groenendyk, Krysha Gregorowicz & Vincent L. Hutchings, *Election Night's Alright for Fighting*, 73 J. POL. 156, 164-68 (2011).
218. Gina M. Garramone, *Effects of Negative Political Advertising: The Roles of Sponsor and Rebuttal*, 29 J. BROADCASTING & ELECTRONIC MEDIA 147, 148 (1985).
219. Cf. Richard N. Engstrom & Christopher Kenny, *The Effects of Independent Expenditures in Senate Elections*, 55 POL. RES. Q. 885, 887 (2002) ("Independent spending . . . has all the advantages enjoyed by those who spend money on campaigns, and is free from the hindrance of accountability."). Weighing in on the subject, Terry Dolan, former Chairman of the National Conservative Political Action Committee added, "A group like ours [an outside group] can lie through its teeth and the candidate it helps stays clean." Myra MacPherson, *The New Right Brigade*, WASH. POST (Aug. 10, 1980), <https://www.washingtonpost.com>

sponsored by outside groups add “substantially more valu[e] than dollar-equivalent contributions because they come with an ‘anonymity premium.’”²²⁰ The sponsoring group is often an unknown, obscurely named entity, and any backlash for their advertisement does not transfer to the candidate who remains unaffiliated²²¹ – and in some cases, even publicly denounces the outside group’s ad.²²² Typically, outsourcing attack ads to independent groups comes with a cost to candidates in the form of a loss of control over the political message.²²³ Redboxes ameliorate that cost because they allow candidates to exert direct control over the message that comes from an independent group. In turn, redboxes allow candidates to collect only the *upsides* of political speech (including the influence of that speech on voters’ candidate preferences) without inflicting any marginal costs (including the backlash of negative advertising). The practice makes it exceedingly difficult for voters to hold candidates responsible for their own speech because it allows a super PAC to use its voice to speak a candidate’s words. In addition, because candidates are no longer forced to internalize the reputational costs of their speech, the tone of political discourse has suffered.²²⁴ Inundating the electoral landscape with advertisements that depict the opposition in an undesirable light is thought by leading political scientists on the topic to contribute to affective (that is, interparty) polarization of the electorate.²²⁵

/archive/lifestyle/1980/08/10/the-new-right-brigade/24c8ed98-3af7-4385-9coe-f973bea20612 [https://perma.cc/B6H8-5P4M].

220. *FEC v. Christian Coal.*, 52 F. Supp. 2d 45, 88 (D.D.C. 1999). For more on how super PACs provide candidates with a buffer from the backlash effects of negative advertising, see Connor M. Dowling & Amber Wichowsky, *Attacks Without Consequence? Candidates, Parties, Groups, and the Changing Face of Negative Advertising*, 59 AM. J. POL. SCI. 19, 30-33 (2015).
221. Deborah Jordan Brooks & Michael Murov, *Assessing Accountability in a Post-Citizens United Era: The Effects of Attack Ad Sponsorship by Unknown Independent Groups*, 40 AM. POL. RES. 383, 400-03 (2012).
222. See, e.g., Robert Rizzuto, *Elizabeth Warren and Sen. Scott Brown Both Denounce Latest Crossroads GPS Ad*, MASSLIVE (Mar. 24, 2019), https://www.masslive.com/politics/2011/12/elizabeth_warren_and_sen_scott.html [https://perma.cc/5SJ8-6BGH].
223. Brooks & Murov, *supra* note 221, at 405-06.
224. Since *Citizens United*, independent expenditures have increased as a share of all campaign expenditures, see *supra* note 24 and accompanying text, and average independent expenditures to oppose a candidate for federal office have dwarfed independent expenditures in support of federal candidates. Additionally, the share of negative spending has also grown as a share of total independent spending in the three election cycles following the decision, supporting the notion that campaign discourse has become more negative in the last decade. See Chaturvedi & Holloway, *supra* note 87, at 254 fig.1.
225. See Gaurav Sood & Shanto Iyengar, *Coming to Dislike Your Opponents: The Polarizing Impact of Political Campaigns* (Sept. 17, 2016) (unpublished manuscript), <https://ssrn.com>

On top of eroding the ability of voters to attribute political speech to candidates, redboxing helps candidates evade another foundational accountability mechanism: disclosure. The practice enables misattribution of costs from candidates to super PACs, frustrating the ability to link candidates to their beneficiaries. While the Court has struck down many efforts by Congress to regulate money in politics, it has consistently upheld the government's interest in mandating disclosure to arm the public with crucial information and deter corruption.²²⁶ In the age of the Internet, with information “accessed at the click of a mouse” disclosure is “effective to a degree not possible” previously, offering even “more robust protections against corruption.”²²⁷ Redboxes allow candidates to systematically evade disclosure for expenditures that they would otherwise have to report if they created the advertisement using their own funds. Under the redboxing regime, super PACs bear these advertising and consulting costs and the burden of disclosing their expenditures. However, as discussed, donors to super PACs use creative arrangements under IRS rules to hide their identities in reports to the FEC.²²⁸ Super PACs are also often ambiguously named, dubbing themselves “Crossroads GPS” or “Senate Majority PAC” to confuse voters with “bland labels that give no indication of who is behind” the groups, and making it “a daunting challenge to bring broader accountability to their actions.”²²⁹ Redboxing has proven to be a scheme to aid candidates in systematically funneling their expenditures through super PACs, allowing their donors to obscure their identities and frustrate the fundamental norm of disclosure in campaign finance.

Overall, the redboxing arrangement seems like a good deal for candidates. Redboxes allow them to retain control over their message while independent groups foot the bill, shoulder the backlash of negative campaigning, and in some cases, super PACs also spend money to conduct polling and ad testing to further refine a candidate's messaging. However, the harms of the practice

/abstract=2840225 (finding negative advertising to have especially strong effects on affective polarization). For more on the origins and consequences of affective polarization in American politics, see Shanto Iyengar, Yphtach Lelkes, Matthew Levendusky, Neil Malhotra & Sean J. Westwood, *The Origins and Consequences of Affective Polarization in the United States*, 22 ANN. REV. POL. SCI. 129, 135 (2019).

226. See *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 223-24 (2014) (upholding disclosure); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 366-68 (2010) (same). Most recently, the Court affirmed this commitment to preserve disclosure in *Doe v. Federal Election Commission*, upholding a lower-court ruling mandating disclosure of names in FEC enforcement matters. See 920 F.3d 866 (2019), *cert. denied*, 140 S. Ct. 2506 (2020).

227. *McCutcheon*, 572 U.S. at 224.

228. See *supra* note 190 and accompanying text.

229. LA RAJA & SCHAFFNER, *supra* note 209, at 132.

loom large. In an increasingly polarized nation, redboxes contribute to division. They invite the possibility of actual quid pro quo bargains, and perhaps worse, give voters the feeling that these bargains are rampant. Additionally, redboxes frustrate traditional accountability mechanisms for voters to hold candidates responsible for their words and allow candidates to evade the longstanding norm of disclosure. Given these ills, in the following Part, I discuss the challenges and opportunities of immediate enforcement, and present possible reforms to root out the practice from our politics once and for all.

IV. ENFORCEMENT OPPORTUNITIES, CHALLENGES, AND THE POTENTIAL FOR REFORM

The growth of redboxing in the last decade, in terms of both its frequency and brazenness, is a trend likely to continue without greater enforcement. Because redboxes likely meet the request or suggestion conduct standard of 11 C.F.R. § 109.21(d)(1), additional FEC enforcement is warranted.²³⁰ In Section IV.A, I discuss how reform-minded litigators and groups can begin to root out the practice through the FEC's already-available channels for initiating enforcement actions.²³¹ However, as I describe in Section IV.B, enforcement alone presents serious concerns, including disparate treatment of partisans and pushing coordinative behavior underground. To ameliorate some of these apprehensions, Section IV.C proposes clarifying regulation that a willing FEC can enact. Ultimately, however, the incoherence of coordination law is a problem that Congress must resolve—Section IV.D makes the case for specific congressional action to address redboxing.

A. Enforcement Opportunities

To maximize enforcement opportunities, this Section provides suggestions to streamline complaints filed before the FEC to challenge redboxing. Perhaps without knowing it, and certainly without calling the practice by its name, NGOs and political groups have already brought complaints of redboxing before the FEC. Between 2014 and 2016, state Republican Party organizations, and the Foundation for Accountability and Civic Trust, a conservative Koch-funded group ostensibly dedicated to upholding campaign finance and ethics

230. See *supra* Section II.C (arguing that redboxing qualifies as a request or suggestion under 11 C.F.R. § 109.21(d)(1)).

231. See generally *Guidebook on the FEC Enforcement Process*, *supra* note 109 (describing the stages of the FEC's enforcement processes).

rules, brought a series of complaints against Democratic Senate candidates for their use of redboxing.²³² While each of these groups employed different litigation strategies, the most pointed of the complaints alleged that Democratic campaigns coordinated with independent-expenditure-only political committees by “posting on [the candidate’s] website information [the candidate] wanted incorporated in ads in certain markets with the code words ‘voters need to know.’”²³³ However, each of these complaints have failed to proceed past the first of two stages of FEC review because they have not identified the mechanisms that make public information on political websites a request or suggestion for a communication to a *nonpublic* audience.

At the first stage of review, the FEC’s Office of General Counsel evaluates whether there is “reason to believe” that a violation of the relevant law has taken place or will take place.²³⁴ The General Counsel’s office conveys their recommendation to the Commissioners, who then vote on whether to initiate an investigation. As the FEC’s General Counsel stated as its rationale for dismissing one of these prior redboxing complaints, “the alleged request for advertising . . . was communicated *only* by information appearing on the candidate’s publicly available campaign website” and the “cited similarities between the website and the commercials, and the timing and geographic placement of the commercials, are insufficient to show that any additional private communications occurred.”²³⁵ In the eyes of the FEC’s General Counsel, prior redboxing complaints have “fail[ed] to identify any communication between representatives of [the candidate’s campaign or political party and the super PAC].”²³⁶

To date, none of the complaints of redboxing brought before the commission have identified the specific signals known to super PAC operatives—but not to the general public—as requests for an advertisement. With that said, reform-minded NGOs and political committees who bring complaints before the FEC should first consider incorporating this Note’s arguments on the “magic signals” and their origins as the nexus for an impermissible request or sugges-

232. See, e.g., FEC MUR 7142 (Evan Bayh Committee, et al.), Complaint, (Sept. 19, 2016), <https://www.fec.gov/files/legal/murs/7142/18044444270.pdf> [https://perma.cc/82XX-LR7K]; FEC MUR 7029 (McGinty for Senate), Complaint, (Mar. 15, 2016), <https://www.fec.gov/files/legal/murs/7029/16044403899.pdf> [https://perma.cc/RW8R-LHLD]; Complaint, *supra* note 75.

233. FEC MUR 7142 (Evan Bayh Committee, et al.), First General Counsel’s Report, at 5 (Oct. 24, 2017), <https://www.fec.gov/files/legal/murs/7142/18044444339.pdf> [https://perma.cc/H2KE-5TX6].

234. *Guidebook on the FEC Enforcement Process*, *supra* note 109, at 12-13.

235. First General Counsel’s Report, *supra* note 233, at 5 (emphasis added).

236. See, e.g., First General Counsel’s Report, *supra* note 109, at 8.

tion to a *specific* super PAC audience.²³⁷ Since the FEC is often unable to pinpoint what exactly about the practice of redboxing is suggestive, adopting a litigation strategy that focuses on “magic signals” and their function as well-understood “winks and nods” among political professionals may help new claims succeed. At the least, even if new complaints incorporating the “magic signals” and their origins fail before the FEC, they will help to build a corpus of signals to bring the FEC’s attention to this practice. In so doing, more complaints may pressure political candidates and super PACs to change the signals they use and, in the short term, frustrate their attempts to coordinate. Additionally, documenting the “magic signals” of redboxing with the FEC through successive cycles of complaints might prove to the FEC how pervasive the practice actually is, legitimizing the allegations over time.

Second, those who bring complaints should consider alleging *only* a violation of the request or suggestion conduct standard codified at 11 C.F.R. § 109.21(d)(1). Currently, most complaints brought before the FEC that challenge practices similar to redboxing allege violation of a combination of conduct standards²³⁸ – the request or suggestion,²³⁹ material involvement,²⁴⁰ substantial discussion,²⁴¹ and republication of campaign material standards.²⁴² This litigation strategy casts the widest net of violations possible. However, two of the violations have clear exceptions for publicly available information.²⁴³ And because the practice of redboxing looks like material involvement, substantial discussion, and republication when it is described in a complaint without mention of the “magic signals,” those who defend the practice have responded to complaints saying that either the safe harbor applies, or that the republication standard does not apply because the ad is not copied from the redbox verbatim.²⁴⁴ Removing from complaints all mentions of alleged violations of the conduct prong save for the request or suggestion standard may help to alleviate the issues prior complaints have faced in moving forward before the Commission.

237. See *supra* Sections I.B, II.C.

238. See, e.g., Complaint, *supra* note 75, at 3.

239. 11 C.F.R. § 109.21(d)(1) (2021).

240. *Id.* § 109.21(d)(2).

241. *Id.* § 109.21(d)(3).

242. *Id.* § 109.21(d)(6); *id.* § 109.23(a).

243. See *supra* Section II.C.

244. FEC MUR 6821 (Shaheen for Senate, et al.), Response to Complaint, *supra* note 144, at 4-5.

B. Enforcement Challenges

Despite the possibility of enforcement action to remedy redboxing, there are reasons to be wary of it. Differences in redboxing strategies between Republicans and Democrats present concerns of disparate enforcement. In addition, increased enforcement carries the possibility of pushing coordinative behavior offline, making it virtually impossible to detect. Broadly speaking, Democrats redbox in a more standardized way. That is, most instances of Democratic redboxing have several, if not all, of the “magic signals” identified in Part I²⁴⁵—the colored box, phrase “voters need to know,” targeting information, microsites, and production and back-up information.²⁴⁶ By contrast, Republican use of the practice is somewhat more difficult to pin down. While many GOP redboxes also have each of the “magic signals,”²⁴⁷ there also seems to be concurrent surreptitious coordination to supplement these public cues.²⁴⁸ For example, in two instances of Republican signaling mentioned in this Note, Matt Rosendale of Montana and the NRCC’s coded Twitter, private conversations with super PACs were alleged to have also taken place around the same time as the public signals.²⁴⁹

These differences not only present issues of equitable enforcement, but may also create perverse incentives for candidates and committees to move once-public behavior underground and to file frivolous complaints. First, greater enforcement is likely to disproportionately affect Democrats, who engage in more traditional forms of redboxing. Republican-affiliated candidates and groups who engage in subtler forms of redboxing, with fewer “magic signals” and potential non-public conversations to supplement public cues, are more likely to evade enforcement.

Next, an enforcement regime that disproportionately punishes the most easily uncoverable illegal coordination naturally incentivizes once-overt public behavior to move underground. Additionally, the FEC’s process of independent investigations of complaints, consisting of interviews and discovery, occurs on-

²⁴⁵. See *supra* Section I.B.

²⁴⁶. See, e.g., MARK KELLY FOR U.S. SENATE, *supra* note 45.

²⁴⁷. See *supra* note 72 and accompanying text.

²⁴⁸. See, e.g., First General Counsel’s Report, *supra* note 166, at 2-8 (detailing the NRCC’s use of a coded Twitter to facilitate coordination with super PACs); *supra* Section I.C (detailing the Matt Rosendale for Montana example). Compare DEMOCRAT FACTS, *supra* note 51, with DCCC, RACES, *supra* note 53 (illustrating that the NRCC’s microsite is not affiliated with the NRCC’s main page, whereas the DCCC’s site is easily accessible by all who visit the Committee’s official website).

²⁴⁹. See *supra* notes 67-69, 169-173 and accompanying text.

ly *after* a complaint is sufficiently pleaded to make it past the initial stage of review.²⁵⁰ Therefore, this might result in more difficult-to-locate microsites, on webpages that members of the general public would never find. Or perhaps enforcement of only the most easily uncoverable instances of redboxing might push operatives to coordinate out of public sight, through secret meetings or phone calls. A regime that pushes coordination underground would arguably be worse for quid pro quo corruption and political accountability.

Finally, if the FEC takes complaints of redboxing seriously and begins to issue findings of impermissible contributions, candidates may try to wield the cudgel of coordination against their opponents.²⁵¹ They may claim that their opponents have impermissibly coordinated as a mudslinging tactic and lodge a complaint with the FEC to legitimize their claims.²⁵² In the short term, this tactic may be successful because FEC complaints often take months or even years to resolve.²⁵³ By the time the FEC rules on the complaint, elections are typically over and the damage to the campaign is done. Beyond the damage done to the campaign, wielding allegations of illegal coordination against political opponents harms trust in democracy, and contributes to the *appearance* of widespread corruption.

C. Proposals for Clarifying Regulation

Enforcement actions may not be the wisest path to root out redboxing. Instead, additional regulation by the FEC that clarifies the illegality of redboxing might present the best solution. For now, I set aside concerns about the feasibility of enacting new regulation. Despite the ideological composition of the current Commissioners and history of underenforcement, the FEC retains the ability to discourage and prohibit redboxing through guidance and formal rulemaking. I propose several such actions directed specifically at rooting out the practice of redboxing. None of them presents a silver-bullet solution, but initiating formal rulemaking or guidance can serve a norm-enunciation role. By taking affirmative effort to address redboxing, the FEC can declare that it takes coordination – and enforcement of campaign-finance law – seriously.

250. See *Guidebook on the FEC Enforcement Process*, *supra* note 109, at 6-7.

251. See George S. Scoville III, *Curtailing the Cudgel of “Coordination” by Curing Confusion: How States Can Fix What the Feds Got Wrong on Campaign Finance*, 48 U. MEM. L. REV. 463 (2017) (describing how the “cudgel of coordination” can be wielded against political opponents).

252. *Id.* at 496.

253. See *FEC Enforcement Programs*, Fed. Election Comm’n, <https://www.fec.gov/press/resources-journalists/fec-enforcement-programs> [<https://perma.cc/623J-M47E>] (noting that the average case closure in fiscal year 2017 was 15.3 months).

1. Guidance on “Magic Signals”

At base, the FEC can issue immediate guidance to state that it will treat the presence of “magic signals”²⁵⁴ on a publicly available website as a reason to believe there has been a request or suggestion for a communication in violation of the conduct prong. Through an interpretive rule, the Commission can specify that the “magic signals” identified within this Note—the colored box, the phrase “voters need to know,” party committee microsites, targeting information, and the availability of back-up or production elements—will be closely examined by the FEC for their potential to indicate a violation of the conduct prong.²⁵⁵ While the presence of certain signals are not *by themselves* dispositive of illegal coordination, their presence indicates that private conversations have taken place to determine which signals will be used as winks or nods to request communications. The signals help to facilitate violations of contribution limits²⁵⁶ which can be prosecuted as criminal offenses.²⁵⁷

Guidance by the FEC will not be a cure-all pill to remedy redboxing: it has no teeth. However, by putting candidates and political committees on notice that the Commission is aware of redboxing and its associated signaling mechanisms, guidance can work to shift the behavior of regulated entities.²⁵⁸ Most optimistically, guidance may compel candidates and parties to change up their

²⁵⁴. See *supra* Section I.B.

²⁵⁵. The signals themselves are not protected speech because, as the Roberts Court has affirmed, “[s]pecific criminal acts are not protected speech even if speech is the means for their commission.” *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017) (citing *Brandenburg v. Ohio*, 395 U.S. 444, 447-49 (1969) (per curiam)). “[T]he First Amendment permits” the enactment of “specific, narrowly tailored laws that prohibit . . . conduct that often presages a . . . crime,” even if otherwise protected speech would be implicated. *Id.* Counsel for the Brennan Center, Brent Ferguson, agrees that it is likely that such a “prophylactic provision preventing” the “circumvention [of] the law” is “surely permissible,” given that the FEC already allows prophylactic provisions preventing the republication of campaign material. Ferguson, *supra* note 129, at 497-98.

²⁵⁶. The existence of coordination transforms an independent expenditure into an in-kind contribution. As such, complaints before the FEC that allege impermissible coordination under the regulation, see 11 C.F.R. § 109.21 (2020), are treated as excessive campaign contributions in violation of 52 U.S.C. § 30116 (2018).

²⁵⁷. See, e.g., Matt Zapotosky & Matea Gold, *Va. Political Operative Pleads Guilty to Coordinating Campaign Contributions*, WASH. POST (Feb. 12, 2015), https://www.washingtonpost.com/local/crime/va-man-pleads-guilty-to-coordinating-campaign-contributions/2015/02/12/e63a92dc-b146-11e4-827f-93f454140e2b_story.html [<https://perma.cc/M7YA-9MMV>].

²⁵⁸. See Nicholas R. Parrillo, *Federal Agency Guidance and the Power to Bind: An Empirical Study of Agencies and Industries*, 36 YALE J. ON REG. 165, 178 (2019).

signals, which will, in the short-term, frustrate their ability to communicate plans and requests to super PACs.

2. *Regulation to Shift the Burden of Proof*

In addition to guidance on “magic signals,” the FEC can initiate rulemaking efforts to shift the burden of proof to *respondents* in enforcement actions that allege a violation of coordination rules. A major barrier to the enforcement of federal coordination rules against redboxing is that the legal standard is extremely friendly to the regulated party. The FEC applies two standards of proof to complaints that are proven to meet in practice—the “reason to believe” standard at the initial stage, and the “probable cause” standard after an investigation.²⁵⁹ Without ordering further discovery, the agency often dismisses complaints based solely on the respondent’s assertion that no violation has occurred.²⁶⁰ At least two states, California and Connecticut, have developed an alternative, lower standard of proof for assessing coordination in state elections.²⁶¹ Rather than starting with the presumption that all communications by independent-expenditure-only groups are independent, these states regulate independent expenditures under “a rebuttable presumption that an expenditure funding a communication is made at the behest of a candidate or committee and not independent[ly]” when “[t]he expenditure is based on information about the candidate’s or committee’s campaign needs or plans that the candidate or committee provided to the expending person directly or indirectly, such as information concerning campaign messaging, planned expenditures or polling data.”²⁶²

The FEC could model a revised regulation based on California and Connecticut, adopting a *presumption of coordination*. In turn, this would shift the burden of proof from the agency to the regulated party. Burden-shifting is not without precedent in federal regulation.²⁶³ Indeed, the Federal Trade Commission (FTC) regulates commercial advertising using the doctrine of advertising

259. See *Guidebook on the FEC Enforcement Process*, *supra* note 109, at 4-6.

260. See, e.g., FEC MUR 6908 (National Republican Congressional Committee), Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioner Caroline C. Hunter, at 4-7 (May 2, 2019), https://www.fec.gov/files/legal/murs/6908/6908_1.pdf [<https://perma.cc/7BSS-3NHM>].

261. See CAL. CODE REGS. tit. 2 §§ 18225.7(d)-(d)(1) (2020); CONN. GEN. STAT. ANN. § 9-601c(b) (2020); *id.* § 9-601c(b)(7).

262. Tit. 2 §§ 18225.7(d)-(d)(1).

263. See Ashutosh Bhagwat, *Modes of Regulatory Enforcement and the Problem of Administrative Discretion*, 50 HASTINGS L.J. 1275, 1287-88 (1999).

substantiation.²⁶⁴ The doctrine allows the FTC to initiate an enforcement action against an advertiser “without having to prove that the ad is deceptive; the burden is on the advertiser to show that its claims were adequately supported when made.”²⁶⁵ Application of this principle to coordination claims against independent political communications could function similarly.

This burden-shifting regime would not chill speech because when faced with a complaint, the super PAC would need only prove that it had an independent basis for its advertisement, distinct from the redbox, which could be demonstrated through polling data, ad tests, or public news clips. For the vast majority of independent expenditures, a burden-shifting regime would have no perceptible effect on chilling speech. It would just require independent spenders to do their own homework, rather than copy information from a candidate’s or party’s website, before they air an ad.

D. An Appeal for Congressional Action

As a result of the 2020 election, the country finally has a Congress poised to act on comprehensive campaign-finance reform for the first time in almost two decades – and for the first time since the rise of the super PAC.²⁶⁶ Even if vigorously pursued by reformers and the FEC, enforcement actions and new regulation will likely come up short in finding and eradicating all instances of redboxing. However, the enforcement puzzle presented in this Note underscores just how unsophisticated and misguided the Supreme Court’s campaign-finance jurisprudence really is – and that the FEC’s test for coordination does not draw administrable lines but creates gaping loopholes. Congress should act to force the FEC to repeal current coordination rules and adopt a workable, properly calibrated test to deal with redboxing and other coordinative practices that have emerged in the post-*Citizens United* world.

Reversing the current system that bifurcates contributions and expenditures may be impossible, short of a constitutional amendment,²⁶⁷ given the

²⁶⁴ *Id.* at 1287; see also Patricia P. Bailey, *How Advertising Is Regulated in the United States*, 54 ANTI-TRUST L.J. 531, 534 (1985).

²⁶⁵ Bailey, *supra* note 264, at 534.

²⁶⁶ See Carrie Levine, *Democrats Push Wide-Ranging Voting, Ethics Reforms, in Charged Moment for Democracy*, CTR. PUB. INTEGRITY (Jan. 15, 2021), <https://publicintegrity.org/politics/elections/ballotboxbarriers/voting-reforms-moment-for-democracy> [https://perma.cc/RQ64-PNPH].

²⁶⁷ See Press Release, Congressman Ted Deutch, *Bipartisan Constitutional Amendment to Overturn Citizens United Introduced* (Jan. 21, 2021), <https://teddeutch.house.gov/news/documentsingle.aspx?DocumentID=402908> [https://perma.cc/XEY5-8758].

current Court and the growing body of precedent. But the system still need not be accepted as is. The 117th Congress may present the best opportunity in decades to act to reform the coordination rules, if it can pass the For the People Act. In its current form, the legislation makes great strides to expand the definition of coordination, with its express commitment to stopping super PAC and candidate coordination.²⁶⁸ As amended, Congress directs the FEC to repeal the coordination rules on the books and repromulgate them to find coordination when: a super PAC is established at the behest of a candidate,²⁶⁹ a candidate assists with a super PAC's fundraising,²⁷⁰ a super PAC hires a candidate's former staff member within four years of employment with the candidate,²⁷¹ or hires consultants of a candidate's campaign within two years of their employment with the candidate,²⁷² or hires family members of the candidate.²⁷³

Despite these sweeping reforms to coordination rules, the Act does not address redboxing or online signaling at all. Congressional reform efforts can be strengthened by adding a provision to direct the FEC to presume a super PAC acts as a coordinated spender when they rely upon redboxing as the impetus for an expenditure. For now, press coverage would be helpful in encouraging future legislative reform, as increasing public awareness of redboxing is the best bet to spark the will for politicians to act.

CONCLUSION

By revealing how the practice of redboxing works in federal elections, this Note has sought to demonstrate that the law against coordination is underinclusive and fails to prevent against actual coordination occurring between candidates, parties, and outside groups.²⁷⁴ The FEC has not updated its coordination rules since the *Citizens United* decision in 2010.²⁷⁵ In the decade since, the nature of campaigning has changed significantly. Now, teams of partisan super PACs, party committees, and candidates work together to compete in federal elections. New technology, such as political microsites, Twitter, and other in-

268. See H.R. 1, 117th Cong. (2021).

269. *Id.* § 327(c)(2)(A).

270. *Id.* § 327(c)(2)(B).

271. *Id.* § 327(c)(2)(C).

272. *Id.* § 327(c)(2)(D).

273. *Id.* § 327(c)(2)(E).

274. See Gilbert & Barnes, *supra* note 16, at 418 (commenting on the underinclusiveness of coordination rules).

275. See 11 C.F.R. § 109.20 (2021).

novative online prearrangements, provide myriad opportunities for these groups to communicate in plain sight. All the while, the law remains silent on this behavior.

This Note contends that redboxing, a practice allowed to grow unimpeded in the post-*Citizens United* world, constitutes an illegal request or suggestion for a communication.²⁷⁶ But redboxing is not the only practice that facilitates coordination. Discovering these signaling practices and rooting out their corruptive effects upon our democracy is not a simple task. With such high stakes, neither party can be expected to cede ground by refusing to engage in these behaviors. It is up to Congress, the FEC, and the courts to identify and weed out these practices through clear and consistent laws and regulations.

Moreover, clarifying the distinction between coordination and independence is fundamental to preserving a coherent system of campaign-finance law. The Court affirmed that “Congress drew a functional, not a formal, line between contributions and expenditures.”²⁷⁷ This line, along with the Court’s campaign-finance jurisprudence ordered around it, presupposes that there is a fundamental difference between independent spending and spending that is coordinated with a candidate. Without a workable distinction between coordination and independence, meaningful campaign-finance regulation is limited if not altogether foreclosed. If we are truly committed to preserving the integrity of our electoral system, we need not search hard for where to begin to make change. Start with a little red box, hiding in plain sight.

²⁷⁶. See *id.* § 109.21(d)(1).

²⁷⁷. *Fed. Election Comm’n v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 443 (2001).